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The Fundamentals of Libertarian Ethics

The single fastest route from novice to expert in Austrian legal theory.

The Nature of Law

Law is to be understood as a normative discipline which identifies certain actions as just or unjust. That is to say, law is a subset of ethics which identifies which party ought have possession in a given conflict.

> If ethics is a normative discipline that identifies and classifies certain sets of actions as good or evil, right or wrong, then tort or criminal law is a subset of ethics identifying certain actions as appropriate for using violence against them. The law says that action X should be illegal, and therefore *should* be combated by the violence of the law. The law is a set of "ought" or normative propositions.
>
> —Murray Rothbard[1]

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Law as a Subset of Ethics

To proceed with an explication of Austrian legal theory, we must understand what the nature of law is. First, law is a normative standard, that is to say that law is evaluative—legal theory identifies a group of criminals and a group of non-criminals with reference to a norm. However, there are normative questions that law does not cover–such as the question of where to plant ones crops, or by what standard should art be judged–that is to say, there may be certain norms, certain guides to action, which are not covered by law, so law cannot be *exhaustive* of evaluative philosophy.

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[1] Murray N. Rothbard, "Law, Property Rights, and Air Pollution," in idem. *The Logic of Action Two*, p. 122, https://cdn.mises.org/Law,%20Property%20Rights,%20and%20Air%20Pollution_2.pdf

[2] https://liquidzulu.github.io/libertarian-ethics

Second, we know that law deals with *justice*, that is to say, law prohibits that which is unjust, and permits that which is just. What is meant by saying that X is just, is that X can be argumentatively justified. So law is a normative standard which guides men to just over unjust actions.

Third, argumentative justification is a human action, requiring the use of scarce means—lets unpack that. Action is defined as purposeful behaviour, it is the implementation of some scarce means towards some end—consider the example of John eating a ham sandwich to satiate his hunger. His end is the removal of the hunger, and his means to achieve this end is the ham sandwich. Of note here is that the means a man employs is necessarily scarce, which means that his use of it prevents others from being able to use it. Therefore in argumentatively justifying anything a man has to concern himself with scarcity.

Fourth, because of scarcity there is a possibility for conflicts. Conflicts are defined as contradictory actions, so if Crusoe and Friday are on an island and Crusoe is trying to use a stick to spearfish at the same time that Friday is trying to use it to stoke his fire we have a conflict. The stick is scarce, so its use by one man prevents the other man from using it, so only one action–spear fishing or the stoking of the fire–is able to take place, that is to say that one action excludes the other.

Fifth, because the possibility for conflict exists and cannot be ignored in argumentative justification, any legal theory must assign exclusive property rights so as to determine the just winner in a given conflict. That is to say, law identifies which set of people are engaged in just direction (non-criminals) and which set are engaged in unjust direction (criminals). In other words, law couldn't assign that a given direction of some means is both just and unjust. Here a property right in α held by A means that A is the one who has the right to direct the use of α.

Sixth, a position on the just winner in a conflict, which is to say a position on law, is a position on ethics. Ethics is the area of philosophy which deals in general with guides to mans action—i.e. what man ought do. Specifically, law is a subset of ethics which deals with who should have possession of what, or more specifically who should be the one directing the possession of what, we can therefore define law as ethics applied to the issue of conflicts. This is specifically a subset of inter-personal ethics, contrasted with autistic ethics which deals with how the man alone should act. So ethics is made of autistic and inter-personal ethics, and law is a subset of the latter dealing not in general with how men should interact, but with the subset of interactions that are defined as conflicts. Consider what it would mean to say that law is not in fact a subset of ethics — A claims that he cannot justify his direction of the use of α, but also that he should nevertheless be its director. What is meant by A claiming that he should direct α? This claim by A is an attempt to justify A's direction, which A claims that he cannot do, therefore A is in contradiction, we shall see shortly that contradictions are falsehoods, therefore meaning that it cannot be the case that A should be the director where said direction is unjust. So, law must be a subset of ethics—there does not exist any legal claim which is not also a moral claim.

Objective Law and its Critics

The Failure of Legal Polylogism

As we have seen, law is strictly derivable from the nature of argumentation as a human action, employing scarce physical means, therefore to assert that there are multiple different legal codes is to assert that there are multiple different logics, which is called polylogism. Legal-polylogism, then, is the claim that different men may be able to adopt different logics in their argumentative justification of a system of property rights.

The general problem with legal-polylogism is that it implies contradiction, because for there to be different legal codes, $A, \cdots, Z$, A must be incompatible with every other legal code, $B, \cdots, Z$, in at least one aspect, or else they would not be different, but the same, and we would be back to singular law. Imagine that A and B are incompatible on an action α, A claims it to be just and B claims it to be unjust. The legal-polylogist asserts that both A *and* B are correct, that α can both be justified and it cannot be justified—a contradiction. The problem with that is that contradictions are false, which we can see from the nature of argumentation. Imagine Sally and Eric are in an argument over the truth of the proposition p. Eric claims that p is the case, and Sally claims that p is not the case—meaning that Eric asserts p and Sally asserts $\neg p$. For Sallys case to be considered an attempted refutation of Eric, rather than simply speaking gibberish or telling a joke, she must pre-suppose that p and $\neg p$ cannot both be correct—that is to say, in disputing anything, you pre-suppose the law of non-contradiction, $\neg(p \wedge \neg p)$.

The Failure of Legal Positivism

The Stanford Encyclopædia of Philosophy defines legal positivism as the thesis that the existence and content of law depends on social facts and not its merits.[3] In other words, a legal positivist claims that law is not a subset of ethics, and thus there could potentially be such a thing as a virtuous crime to a legal positivist. The article elaborates:

> The positivist thesis does not say that law's merits are unintelligible, unimportant, or peripheral to the philosophy of law. It says that they do not determine whether laws or legal systems *exist*. Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.).

Law to the legal positivist, then, is a description of the specific arrangement of possessions that actually obtain, rather than a theory describing the just arrangement of possessions. Let's break

[3]Green, Leslie and Thomas Adams, "Legal Positivism", *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition), Edward N. Zalta (ed.), https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (archived).

that down, the legal positivist is making the claim that law has nothing to do with justice, rather, the law is determined by raw might, that is if A is able to physically defeat B in a conflict and thus perform an action α, the positivist goes only as far to point and say, "look, A won the conflict, therefore the law on this conflict is that A won." But, this is a complete non-theory; ok, A won, so what? How on Earth they think they get to cordon off an area of philosophy and take the label "law" for what can be summed up in the sentence, "whoever wins a given conflict has won that conflict," is beyond me. The legal positivist as such can't even elucidate a theory predicting when people will choose to engage in conflict and who is likely to win—those would be the domains of economics and military theory respectively.

The problems with the positivist thesis do not stop here, even if a positivist were to reject the separation of law and justice, claiming that might makes right, their theory is still in ruin. Because the might makes right theory of law is a form of legal polylogism—it is the claim that the logic of which actions are justifiable can change depending on whether you are able to successfully carry out that action and muscle away anybody who gets in the way. As we saw above, legal polylogism in general is false, therefore this form of legal positivism is false also.

Any notion of a "source of rights" is indicative of positivism and more fundamentally of the fallacy of primacy of consciousness. Rights simply are, they don't come from some consciousness whether divine or social or individual. It is not arbitrary thoughts or decrees that are the source of rights, but the logic of justification and conflict.

Objective Law as a Science of Human Action

So we have seen that the nature of law implies that there must be universal law—that is, any form of legal polylogism is necessarily false, and further to argue or dispute anything would pre-suppose the existence of a single, universal law. We can say that this universal law is therefore *true* law, as it is the normative foundation of argumentation, and argumentation is a practical pre-condition for ascertaining the truth or validity of anything. Imagine attempting to dispute that this law is true, first you would have to accept its validity as that validity is implied by the act of argumentation, so you would therefore be explicitly proclaiming it to be false whilst implicitly pre-supposing it to be true, which is a contradiction. A contradiction, not between propositions, but between a proposition and the very act of proposing it. But there is no such thing as a free-floating proposition which does not come from an actor proposing it, therefore there is an objective, natural law.

It is this natural law which shall be elucidated in this course, we understand that its nature is that it is specifically a study of human action, the general science of human action is called praxeology, so law is a sub-science of praxeology. Thus it will be of use to briefly go over some basic praxeology here to make comprehension of the rest of the course easier. First, human action is purposeful behaviour, it is distinct from mere behaviour in that the former involves some intentional aiming at a goal, where the latter does not. So the operation of a mans digestive system or the beating of his heart can be understood as mere mechanistic behaviour as the man does not intend to digest or to beat his heart, and on the other hand his choosing to eat food or shock himself with a defibrillator are purposeful, so these are not mere behaviours but are rather actions.

It is this notion of choice which is crucial to understanding something as an action—action involves a deliberate attempt to change the world to one that man finds preferable to the alternative where he does not engage in said action. It is this choice of what man prefers over the alternative that is the characteristic mark of an action. Therefore for action to be possible in the first place, (1) a man must experience some state of uneasiness, something that he doesn't like, (2) an imagined state of the world without this uneasiness and (3) the belief that a given action will work to achieve this imagined state without the uneasiness.

When a man acts the result he wishes to achieve can be called his end, man always acts to remove uneasiness and the end is the imagined state without said uneasiness. For man to achieve the end desired he must employ certain means, metaphysical entities are understood as a means when a human plans to employ or is employing it for the attainment of some end. As has been shown, for a man to engage in an action X as opposed to $\neg X$ implies that the man prefers to engage in X as opposed to $\neg X$. What this preference means is that the man thinks that he should do X rather than the alternative for whatever reason.

> In the context of legal analysis, one important praxeological doctrine is the distinction between action and mere behavior. The difference between action and behavior boils down to intent. Action is an individual's intentional intervention in the physical world, via certain selected means, with the purpose of attaining a state of affairs that is preferable to the conditions that would prevail in the absence of the action. Mere behavior, by contrast, is a person's physical movements that are not undertaken intentionally and that do not manifest any purpose, plan, or design.[4]

Legislation vs Discovery

In learning philosophy it is often of great use to the student to study the history of philosophy such that an understanding of what ideas have been had and where they came from can be attained. Thus a brief overview of the history of (legal) philosophy seems appropriate to include here. Kinsella provides such a brief overview:[5]

> In modern times the two dominant legal systems are the common law and the civil law. Based on the body of English case law that developed gradually over the centuries, the common law spread to English colonies and commonwealths like America, Canada, and Australia. Modern civil law systems are based on Roman law, which, like the common law, developed many of its important legal principles in the accumulated decisions of jurists in thousands of cases. Virtually all of Europe and many other jurisdictions, including Louisiana, Puerto Rico, and Quebec, have a civil-law system.
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> In the common law and Roman law, there eventually evolved very sophisticated bodies of legal principles, concepts, methodology, and precedents. Because the classical common law

[4]N. Stephan Kinsella, "Praxeology and Legal Analysis: Action vs Behaviour" in idem. *Causation and Aggression.*

[5]N. Stephan Kinsella, "Civil Law and Common Law," in idem. *Legislation and the Discovery of Law in a Free Society.*

> and Roman law developed the large bulk of their legal principles through the decision and discussion of cases, they serve as rough examples of decentralized systems of "judge-found" law, as do largely private customary law systems like the Law Merchant.

So broadly speaking there are two types of legal systems; (1) those based upon "judge-found" law, and (2) those where the legal principles are decreed by legislation. Roman law and English common-law are examples of the former, where the legal principles are obtained by judges attempting to do justice in a number of individual cases, which is why such systems are described as case-law systems. Modern civil law, on the other hand, is the prime example of a legislated system, where principles are embodied in a "Civil Code," derived from the arbitrary decree of the legislative branch. Under a legislative system the judges are not attempting to do justice in some particular dispute, rather they make reference to the legislative fiat on this matter, so appealing to a judge that a given law is unjust is not going to work where it would work in a case-law system.

The distinction between "judge-found" law and law as decreed by legislative fiat is an important one—in a de-centralised case-law system the judges are at least setting out to do justice. This is in stark distinction to a fiat-law system, where the so-called "laws" are not rational but are rather arbitrary commandments issued top-down by the legislature. Because these commandments are arbitrary there is nothing objective about the laws in such a system, and because the laws are non-objective but rather based on arbitrary–subjective–whim, such a system is per se incompatible with justice and freedom, "even statutes that seem to embody libertarian principles simultaneously subvert those principles."[6] Because in such a legislative system a victim of objective crime cannot appeal to the objective principles of justice, judges can only accidentally make the right call, and they have no way of determining the correct compensation for the victim. In fact, most often compensating the victim is completely ignored, instead the state will charge the victim money in the form of taxes to punish the criminal by some one-size-fits-all punishment scheme, usually imprisonment.

Bruno Leoni has pointed out further, that fiat law systems will tend towards more legal uncertainty.[7] This is because where law is determined by arbitrary fiat, rather than objective principles of justice, it can change at any moment—this has the effect of making it challenging to even begin to follow the law in the first place. Consider the many thousands of pages of legislation that are committed to the books,[8] professional lawyers whose job it is to know the law could not hope to keep up with this, let alone random citizens. There is also no means of preventing contradictions from occurring between statutes, potentially making it literally impossible to follow the law even if you know about every word of it. This is not so with a found-law system, where there has to be coherence between different objective principles.

So to sum up; the job of the rational jurist is to explicate–discover–objective standards of law, the role of the judge is to attempt to apply this objective body of law in a given case—the rational

[6] N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*.

[7] See Bruno Leoni, *Freedom and the Law*; see also N. Stephan Kinsella, "Certainty," in idem. *Legislation and the Discovery of Law in a Free Society*.

[8] https://legalknowledgebase.com/how-many-laws-does-the-united-states-have

judge attempts to *do justice* rather than apply or create (posit) arbitrary rules based on whim. This is an important insight, those in the David Friedman camp, called polycentrists, view an anarcho-capitalist legal order as one of multi-legislation–multi-centralised law–rather than de-centralised judge-found law. The free-market judge is not a mini-legislature coming up with arbitrary decrees, he is and must be attempting to apply objective legal principles. We can–from the armchair–explicate such an objective body of law, what we cannot do is actually elaborate every possible case that might come up—this is the role of the judge, to attempt to apply abstract and objective principles to concrete cases.

Related Reading

- Murray Rothbard, "Introduction: Natural Law," in idem. *The Ethics of Liberty*.
- N. Stephan Kinsella, *Legislation and the Discovery of Law in a Free Society*.
- N. Stephan Kinsella, "Praxeology and Legal Analysis: Action vs Behaviour" in idem. *Causation and Aggression*.
- Praxgirl, *Praxeology 101*, https://www.youtube.com/watch?v=MoNU_-__LlQ&list=PLEE9A33593A261433

The Non-Aggression Principle

The Non-Aggression Principle is an axiom of law that assigns the property right to the individual who did not initiate a given conflict. Furthermore, justification as such implies a pre-supposition of the validity of this principle, making any denial of it a performative or dialectic contradiction.

> Cognition and truth-seeking as such have a value [normative] foundation. And the normative foundation on which cognition and truth rest is the recognition of private property rights.
>
> —Hans-Hermann Hoppe[9]

Definition

In the previous lesson we discovered some necessary facts about the nature of law; we know that there must be a universal and objective law, and we know that the normative structure of law must be based upon the normative structure of argumentation. In this lesson the central norm–the core axiom of true law–will be made explicit.

We call this central axiom the Non-Aggression Principle, or NAP, and it can be stated as follows: the non-aggressor ought be the director, or that the aggressor ought not be the director (these statements are contra-positive). Let's break that down, here aggression is defined as the initiation of conflict, so in any contest over some property α, if A is the aggressor and B the non-aggressor, B ought be the one to direct the use of α and A ought not.

[9]Hans-Hermann Hoppe (1988), "The Ultimate Justification of the Private Property Ethic," (Liberty), https://libertyunbound.com/wp-content/uploads/2020/08/Liberty_Magazine_September_1988.pdf

The Argument from Argument

The term 'axiom' has a precise meaning in philosophy, unlike in mathematics where axioms are merely inter-consistent but arbitrarily chosen rules,[10] praxeological axioms are self-evident propositions. A proposition is self-evident if you must accept its validity in attempting to dispute its validity. We saw above how the law of non-contradiction is a self-evident proposition, in disputing anything at all you first must accept that the law of non-contradiction holds.

Similarly, in disputing the NAP you pre-suppose its truth as it is implied by the very nature of argumentation. First, recall that argumentation does not exist in a normative void, that is to say there are certain norms which are pre-supposed in the very act of arguing. Consider what it would mean for this not to be the case: if argumentation had no particular normative structure it would lose any meaning—literally any action a man takes could be considered an argumentation: such as eating an apple, or swinging from tree, or shooting someone through the head. It is because of the fact that certain norms *define* a dialectic as such that there is such a thing called argumentation in the first place.

Second, the validity of any truth claim must be raised and decided upon in the course of an argumentation, so the normative structure of argumentation in particular has the special status of being the practical pre-condition for ascertaining the truth or validity of any statement. This is known as the a priori of argumentation, which is another self-evident proposition—if you were to dispute it, you would first have to start arguing thus pre-supposing its truth.

Third, to try and argumentatively dispute one of the norms of argumentation would be to contradict oneself, this is called a dialectic or performative contradiction. That is, it is a contradiction not between propositions, but between a proposition and the very act of proposing it. For instance, if one were to argue that people ought never argue they would first pre-suppose that they should be arguing, thus they are in contradiction. Therefore, the negation of "people ought never argue," which is "people ought ever argue," or "people ought sometimes argue," must be correct. Of note is that under argumentation ethics the "sometimes" is not an arbitrary "when I feel like it," it's something more like, "people should argue to resolve disputes" rather than "people should engage in conflict to resolve disputes."

This is because, fourth, argumentation is a conflict-free interaction, interlocutors have some dispute over the truth of the matter and they are seeking to convince the other not through the force of violence (i.e. by aggressing against them), but rather through the force of their argument. Specifically, argumentation is a method of resolving disputes peacefully, not violently. Consider A and B have a dispute over who has the property right to α, A asserts that they are the owner, and vice versa. Arguing over this dispute would not involve the two parties violently attacking each other, it would involve the exchange of propositions with the intent of determining the truth of the matter. Simply warring over α would not be truth-seeking, interpersonal warfare does not involve argumentative justification and argumentative justification does not involve interpersonal

[10] See Ludwig von Mises (1962), "The Starting Point of Praxeological Thinking," in idem. *The Ultimate Foundation of Economic Science.*

warfare. This means that the normative structure of argumentation implies non-aggression, thus the NAP is dialectically true.

Consider what it would mean to say that this is not the case, that violence is perfectly permissible in an argument. If Crusoe has a disagreement with Friday and Crusoe decides that he will beat Friday until agreement is reached is Crusoe really seeking the truth of the matter here? Clearly he is not, coercing others to not argue with you cannot tend to establish the truth—warfare of this sort is the enemy of reason. Insofar as a man is engaged in unreason, i.e. avoiding truth, he cannot coherently make any truth claim, thus no negation of any proposition can arise from unreason —you have to accept reason to argue at all and accepting reason means accepting the NAP. It certainly cannot be denied that the purpose of argumentation is to seek the truth of the matter, so such aggressive activities that do not tend to establish truth must be excluded from arguments. In short argumentation is a rational activity, and aggression is the enemy of reason, thus these sets of actions must be mutually exclusive. All true propositions are justifiable argumentatively. A true ethic is justifiable to an arguer. Justifiability is irrelevant in a conflict. A conflict cannot be justified to an arguer (if it could, there would be no conflict!). Hence, causing conflicts is against the ethics of argumentation.[11]

> Looked at from another angle, participants in argumentation indisputably need to use and control the scarce resources in the world to survive; otherwise, they would perish. But because their scarcity makes conflict over the uses of resources possible, only norms that determine the proper ownership can avoid conflict over these scarce goods. That such norms are valuable cannot be denied, because anyone who is alive in the world and participating in the practical activity of argumentation cannot deny the value of being able to control scarce resources and the value of avoiding conflicts over such scarce resources.[12]

The Contradiction of Rights-Scepticism

A further proof of the existence of rights is found by considering what it would mean to deny that rights exist. Kinsella introduces the concept as follows:

> If any right at all exists, it is a right of A to have or do X without B's preventing it; and, therefore, A can legitimately use force against B to *enforce* the right. A is concerned with the enforceability of his right to X, and this enforceability is all that A requires in order to be secure in his right to X. For a rights-skeptic meaningfully to challenge A's asserted right, the skeptic must challenge the *enforceability* of the right, instead of merely challenging the existence of the right. Nothing less will do. If the skeptic does not deny that A's proposed enforcement of his purported right is legitimate, then the skeptic has not denied A's right to X, because what it *means* to have a right is to be able to legitimately enforce it. If the skeptic maintains, then, that A has no right to X, indeed, no rights at all since there are no

[11] I am indebted to The French are Harlequins for this particular summary.

[12] N. Stephan Kinsella, "Argumentation Ethics," in idem. *Dialogical Arguments for Libertarian Rights.*

> rights, the skeptic must also maintain that A's enforcement of his purported right to X is not justified.[13]

This presents a problem for the rights-sceptic, however, because he must hold that enforcement–i.e. the use of force–*requires* justification. But *merely* challenging A's use of force is not enough, the rights-sceptic can't just express distaste at the enforcement he must attack the legitimacy of said use of force. But in order to challenge the legitimacy of A using force against B to enforce the right, he must hold that B has a right to not have this force used against him—i.e. that B or someone else can legitimately use force to *stop* A's use of force. But then he is in contradiction, because he must recognise a right held by B in his denial that rights exist.

> More common-sensically, this demonstration points out the inconsistency on the part of a rights-skeptic who engages in discourse about the propriety of rights at all. If there are no rights, then there is no such thing as the justifiable or legitimate use of force, but neither is there such a thing as the unjust use of force. But if there is no unjust use of force, what is it, exactly, that a rights-skeptic is concerned about? If individuals delude themselves into thinking that they have natural rights, and, acting on this assumption, go about enforcing these rights as if they are true, the skeptic has no grounds to complain. To the extent the skeptic complains about people enforcing these illusory rights, he begins to attribute rights to those having force used against them. Any rights-skeptic can only shut up,[14] because he contradicts himself the moment he objects to others' acting as if they have rights.
>
> [...]
>
> Indeed, another way to respond to a rights-skeptic would be to propose to physically harm him. If there are no rights, as he maintains, then he cannot object to being harmed. So, presumably, any rights-skeptic would change his position and admit there were rights (if only so as to be able to object to being harmed)—or there would soon be no more rights-skeptics left alive to give rights-advocates any trouble.

Indirect and Joint Aggression

A somewhat common question raised with respect to the Non-Aggression Principle is whether the mob boss who merely orders his goons to engage in some aggression is himself an aggressor. The answer to this question is yes, both he and his goons are engaged in the aggression in question. To highlight why this is the case consider that a crime is an action—it is the use of efficacious means to cause the invasion of the borders of other peoples' property, because such an invasion initiates conflict between the criminal and the victim. What is important here is that you can use other people as a means towards some end. In the provided example the mob boss is using his goons as a means to cause the invasion of the victims property, and the goons are using their hands or some weapons as means to the same end—both the boss and his goons are engaged in the same aggressive invasion.

[13] N. Stephan Kinsella, "Rights-Skepticism," in idem. *Dialogical Arguments for Libertarian Rights.*

[14] (my footnote, not Kinsella's): Murray Rothbard (1985), *On The Duty Of Natural Outlaws To Shut Up.*

Consider the example of a man shipping a bomb to a victims house using a courier, the bomb blows up upon the victim opening the package, has the bomb-maker committed a crime here? Well, if using other people as means is to break the chain of causation then perhaps the courier is the criminal as he is the one who delivered the bomb. But even this cannot be so, because the bomb only went off upon the victim opening the package, so really the victim has committed suicide! Of course, this is ridiculous, the bomb-maker is well-aware that paying a courier to deliver a package to someone is likely to result in said package being opened—the courier and the victim are both being used as means towards the end of the victim exploding, this is the intent of the bomb-maker.

> Even the [positive] law recognizes that an intervening force only breaks the chain causal connection when it is unforeseeable. As the Restatement of Torts provides, "The intervention of a force which is a normal consequence of a situation created by the actor's … conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about" […] Clearly, when the terrorist in these cases uses a courier to deliver a letter bomb, it is not unforeseeable that the victim will receive it; and it is not unforeseeable that the victim will open it.[15]

This is because if the outcome of a given activity was truly unforeseeable this implies that it is not an action, as for it to be an action the end has to be deliberately aimed at and sought after. Consider me leaving a knife on my kitchen counter that is then whipped away by a tornado and thus stabs a man through the heart. I didn't stab him, the tornado did, because the tornado was unforeseeable by me. If I was a wizard who could control tornadoes and I summoned the tornado to throw my knife into the heart of the man that would be foreseeable and therefore criminal. In other words, A simply hoping that lightning will strike B is different to A knowing exactly when and where lightning will strike and duping B into standing there at the appropriate time—"there is no intention if the outcome is only hoped for."[16]

To make this even more clear consider the example of a rifle that requires three men to shoot—perhaps it has three triggers which are far apart and which all must be pulled to fire the bullet. If three men conspire to each pull a trigger at the same time to shoot an innocent man, then all three of them are engaged in an aggression against this person. We can trivially analogise this to a bomber plane that requires three men to operate—one to steer the plane, one to load the bombs, and a third to trigger the release of the bombs. It is not only the man who triggers the release, but also his two co-conspirators who are each engaged in the action of bombing with the bomber plane—insofar as this bombing is an aggression then all three men are equally liable for this crime.

This is why the getaway driver in a bank robbery is just as liable for the theft as his partners who restrained the crowd and stole the funds from the vault respectively. Furthermore, if in the process of the robbery the crowd-controller shoots one of the hostages the getaway driver and the safecracker are responsible for this murder because the murder is understood to be a part of the

[15] N. Stephan Kinsella and Patrick Tinsley, *Causation and Aggression*

[16] Adolf Reinarch (2000), "On The Concept of Causality in the Current Criminal Law," p. 14. Trans. Berit Brogaard. Jonathan Sandford, ed. (1998) and Ed Rackley (2000); unpublished draft translation; available at www.stephankinsella.com/texts.

entire robbery going forth. If instead they were not robbing a bank, which involves threatening hostages with death, but were rather jointly attempting to steal a car then one of the car thieves randomly sets off a bomb killing countless individuals, then only the bomber is responsible. Setting off the bomb is a separate action to the stealing of the cars, so the co-conspirators to the car theft are not responsible for it.

To re-iterate this point allow me to quote Kinsella:[17]

> Consider the following example. A malcontent, A, purchases a remote-controlled tank. With the remote control he can steer the tank and fire its cannon. He directs the tank to blow down the walls of a neighbor's house, destroying the house and killing the neighbor. No one would deny that A is the cause of the killing and is guilty of murder and trespass. However, after the rampage, a hatch opens in the tank, and an evil midget jumps out. It turns out, you see, that the midget could see on a screen which buttons were pressed on the remote control, and he would operate the tank accordingly. We submit that A is equally liable in both cases. From his point of view, the tank was a "black box" that he used to attain his end, regardless of whether there was a human will somewhere in the chain of causation. (Of course, the evil midget is also liable.)

This "black box" thinking is crucial; consider what would happen if it was discovered some day that firearms are actually sentient and are capable of choosing not to accept a trigger press and that this is the cause of bullet jams. Would this suddenly absolve everyone who has used a firearm to kill another of any criminal responsibility? Surely not, none of these people knew that firearms were sentient and could refuse to shoot, to the gunmen the firearm is a means towards the end of shooting a bullet at their victim(s), this does not change if it is later discovered that firearms have a mind of their own.

> If it is illegal to hit someone [...] this means that it is illegal to *cause* another person to be hit; that is to say, it is illegal to use physical objects, including one's fist, in a way that will cause the unwanted physical contact with another person.
>
> [...]
>
> In analyzing action through the lens of the praxeological means-ends structure to determine if it amounts to aggression, we ask if the actor employed *means* to achieve the end of invading the borders of another's property or body—in other words, we ask if he *caused* the border invasion. The means employed can be inanimate or nonhuman means governed solely by causal laws (a gun), or it can include other humans who are employed as means to achieve the illicit end desired. The latter category includes both innocent humans that one employs to cause a border invasion and culpable humans that one conspires (cooperates) with to achieve the illicit end.[18]

[17] N. Stephan Kinsella and Patrick Tinsley, *Causation and Aggression.*
[18] ibid.

Communication and Social Norms

We can use this analysis to highlight also the guilt of Henry II of England, who reportedly exclaimed "will no one rid me of this turbulent priest" to a group of knights under his employ. The "turbulent priest" referred to the Archbishop of Canterbury who had excommunicated a number of bishops supportive of the king. Four of the kings knights upon hearing the kings utterance went to the archbishop and murdered him. The argument is that the kings words, though not literally worded as an order, nevertheless communicated to his knights that he wished for them to carry out the ridding of the priest. What this highlights is the importance of communication in libertarian theory—the king is using his knights as a means because he is communicating to them his desire for them to kill or otherwise coerce the priest.

What this shows is that social norms and understanding of language can influence whether a given set of words demonstrate an aggression or not. So it may be the case that if I am in a seedy bar and I go up to the biggest, toughest guy in there and call his mother a whore I am in fact communicating to him that I want a fight. Or another case is when I have a mailbox on my front door and a path leading to it, this can be seen as communicating to couriers that I want them to deliver packages by walking up to my door over my path and placing packages inside the mailbox. This demonstrates the limits of what Kinsella dubs "armchair theorising,"[19] one cannot say with certainty whether a given action is aggression without having all of the relevant information provided, which is why judges are necessary in a rational legal system—the judge is able to analyse all of the relevant details to determine who is at fault. The job of the jurist sitting in his armchair is to explicate objective principles and perhaps to apply them to various simple hypothetical scenarios, where all relevant details can be provided.

Related Reading

- Hans-Hermann Hoppe (2005), "On The Ultimate Justification of the Ethics of Private Property," in idem. *The Economics and Ethics of Private Property* second ed.
- Kris Borer (2010), *Cause No Conflict*
- N. Stephan Kinsella, *Dialogical Arguments for Libertarian Rights*

Homesteading and Property Rights

The homesteading principle, which is central to the question of how men attain a property right over some scarce means, is to be properly understood as implied directly by the Non-Aggression Principle. The primacy of the connection between a homesteader and the resource in question cannot be denied by anyone without contradiction, as a prior-later distinction is required for any thought or denial to take place.

> […] the first user and possessor of a good is either its owner or he is not. If he is not, then who is? The person who takes it from him by force? If forcefully taking possession from a prior owner entitles the new possessor to the thing, then there is no such thing as ownership, but only mere possession. But such a rule — that a later user may acquire something by taking it from the previous owner — does not avoid conflicts, it rather authorizes them.

[19] See N. Stephan Kinsella, *The Limits of Armchair Theorizing: The Case of Threats*

—N. Stephan Kinsella[20]

The Homesteading Principle

Derivation from the Non-Aggression Principle

Now that the non-aggression principle has been demonstrated as an apodictically correct axiom of law some initial implications can be derived, the first of which is the homesteading principle, which can be stated as: ownership is assigned to the initial possessor/director of any external good, where *homesteading* is defined as initial possession (it is not particularly relevant whether you define homesteading as initial possession or initial direction, the initial possessor of a good is the one who initially directs the use of it, however I prefer the terminology of direction in most cases as will be made clear later). You will often see this described as the prior-later distinction, that is, the homesteading principle gives precedence to the first comer over any latecomers.

Consider Crusoe and Friday, stranded on a desert island. Crusoe comes across a stick in nature and homesteads it–i.e. takes initial possession of it–then he fashions it into a spear which he plans to use for spearfishing. On his way to the ocean, however, Friday sees this stick and thinks that it would be a useful tool to stoke his fire, and so he attempts to re-possess it–that is take it–from Crusoe. We have a conflict, Crusoe can't spearfish at the same time that Friday stokes his fire, and it is intuitively clear that Friday has initiated this conflict.

First, it must be noted that ownership is necessarily distinct from direction, and this is presupposed as true by both Crusoe and Friday—in asserting different ownership claims they are saying that they are the ones who *justly* direct the use of the stick, i.e. if someone else tries to do so, that is *unjust*. We know this, because *ownership* itself is defined as just direction. Kinsella points out[21] that the fact that ownership and direction[22] are distinct implies that only first possession/direction is justifiable. If B can become the owner of a thing by merely taking it from A, that means that C could take it from B and thereby become the owner—but this would mean that the actual ability to direct the use of a thing and ownership of that thing are not distinct; whomever is able to control the stick would be the owner, and this contradicts the presumption by all parties that ownership and direction *are* distinct. Therefore, as it is a contradiction to propose that the latecomer has a property right, we are left with the initial director having the only justifiable claim to the property right—initial direction is the only just direction, and therefore it is only the homesteader who has the unique status of ownership.

> In other words, we can see not only that Lockean homesteading […] is inextricably bound up with the prior-later distinction […] ***but that the very idea of ownership implies that only libertarian-style ownership is justifiable.***[23]

[20] N. Stephan Kinsella, *Thoughts on the Latecomer and Homesteading Ideas; or, why the very idea of "ownership" implies that only libertarian principles are justifiable*, https://mises.org/wire/thoughts-latecomer-and-homesteading-ideas-or-why-very-idea-ownership-implies-only-libertarian (archived).

[21] ibid.

[22] Kinsella uses the terminology of "possession," but as explained this distinction is not important for the case made here.

[23] ibid.

The Criteria for Property Borders

So property rights are conflict avoiding norms and are assigned to the first-comer rather than any late-comer, and from this fact we can derive a corollary about the nature of a legitimate homesteading claim, namely that the borders of said homesteaded property must be objective and intersubjectively ascertainable. This fact becomes clear when we break it down into its constituent parts; firstly the borders of the homesteaded property must be objective, that is they must adhere to existence as against the arbitrary content of ones consciousness. This is because subjective property borders might contradict, and thus a subjective system of property rights is irrational and could not make for universal law, you will recall that law must be universal and objective to be rational.[24] Consider a system of property rights based upon such arbitrary decrees, for example A having the right to punch B but B not having the right to punch A. This system would not be objective, neither A nor B could rationally derive such a rule, and as such you could not be expected to follow it, what this means is that an arbitrary system of property rights like this cannot avoid conflicts—it would rather authorise them.

Now we turn to the criterion that property borders must be intersubjectively ascertainable—what this means is that they are "public" and can be seen or in some other way perceived by third parties. The reason why rational property borders must be intersubjectively ascertainable is that if they are not they cannot serve to avoid conflicts, and property rights are conflict avoiding norms. Consider a non-intersubjectively ascertainable property border such as a mere verbal decree—Robinson Crusoe decides that he wants to own the moon so he simply shouts to the forest that he now owns the moon. Clearly this verbal decree cannot serve to avoid conflicts, when an astronaut is approaching the moon he has no means of discovering Crusoes supposed property right in the moon, thus Crusoe has not actually homesteaded the moon—he has not erected an objective, intersubjectively ascertainable border.

> […] no one could ever deny that norms for determining the ownership of scarce goods are useful for allowing conflict-free exploitation of such resources. But, as Hoppe points out, there are only two fundamental alternatives for acquiring unowned property: (1) by doing something with things with which no one else had ever done anything before, that is, the Lockean concept of mixing of labour, or homesteading; or (2) simply by verbal declaration or decree. However, a rule that allows property to be owned by mere verbal declaration cannot serve to avoid conflicts, since any number of people could at any time assert conflicting claims of ownership of a particular scarce resource. Only the first alternative, that of Lockean homesteading, establishes an objective […] link between a particular person and a particular scarce resource, and thus no one can deny the Lockean right to homestead unowned resources.[25]

What these criteria for rational property borders highlight is that communication lies at the very root of law. In homesteading a particular scarce resource you have to be able to somehow

[24] See LiquidZulu, "The Nature of Law," in idem. *The Fundamentals of Libertarian Ethics.*

[25] N. Stephan Kinsella, "Argumentation Ethics," in idem. *Dialogical Arguments for Libertarian Rights.*

communicate to others that you are using it, if you fail at this you fail at your task of homesteading and cannot be said to own the thing in the first place.

Homestead Stalemates

An important edge-case must be analysed for this theory to be complete, namely the instance of Crusoe and Friday simultaneously attempting to take possession of a stick in nature. Clearly neither came prior to the other, so it is improper to describe either as a first- or late-comer. In this situation Crusoe and Friday are in a stalemate, where the term "stalemate" is used to indicate that this is not a conflict. From the definition of the hypothetical, we know that neither Crusoe nor Friday have actually started engaging in their chosen action with the stick, as in the first instant the stick was in nature, then the very next instant both Crusoe and Friday made an attempt to begin acting with it. This attempt is not yet complete and the action has not yet started until the other backs off.

Such a stalemate situation may turn into a conflict if either Crusoe or Friday forcefully excludes the other from completing their homesteading of the stick. This is a situation of the forceful one, say Crusoe, excluding the other from that which he does not own. This is an invasion from Crusoe against Friday, therefore Crusoe is the aggressor and not the proper owner of the stick. Clearly there is now a conflict over the use of the stick, else Crusoe would not be excluding Friday from the stick but from something else, and it is Crusoe who has initiated this conflict. Thus to forcefully exclude the other in a stalemate situation is to disqualify yourself from ownership of the good under stalemate, thereby ceding ownership to the other. The simpler case is when either Crusoe or Friday decide that they will back off on their own, thus non-aggressively breaking the stalemate and ceding ownership to the other, more stubborn man.

Against the Georgist Anti-Homestead Ethic

Now we must turn our attention to the Georgist anti-homestead ethic, which would claim that the first possessor *also* doesn't have the ownership right, and in fact that homesteading itself is a crime against everyone else.[26] This ethic fails on the grounds of its very proposal, to engage in argumentation one must first homestead *something*, at the very least their standing room. Before beginning any ethical deliberation you therefore must accept it to be just–that is to say argumentatively justifiable–to take initial possession and to therefore initially direct the use of some scarce physical means.

Hoppe explains that a latecomer ethic implies the death of humanity:[27]

> What is wrong with this idea of dropping the prior-later distinction as morally irrelevant? First, if the late-comers, i.e., those who did not in fact do something with some scarce goods, had indeed as much of a right to them as the first-comers, i.e., those who did do something with the scarce goods, then literally no one would be allowed to do anything with anything, as one would have to have all of the late-comers' consent prior to doing whatever one wanted

[26] See LiquidZulu, *Georgists Don't Understand Rights*, https://youtu.be/1iH4FqMDE0Y

[27] Hans-Hermann Hoppe (1988), "The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible," pp. 169-171, in idem. *A Theory of Socialism and Capitalism.*

to do. Indeed, as posterity would include one's children's children—people, that is, who come so late that one could never possibly ask them—advocating a legal system that does not make use of the prior-later distinction as part of its underlying property theory is simply absurd in that it implies advocating death but must presuppose life to advocate any thing. Neither we, our forefathers, nor our progeny could, do, or will survive and say or argue anything if one were to follow this rule. In order for any person—past, present, or future—to argue anything it must be possible to survive now. Nobody can wait and suspend acting until everyone of an indeterminate class of late-comers happens to appear and agree to what one wants to do. Rather, insofar as a person finds himself alone, he must be able to act, to use, produce, consume goods straightaway, prior to any agreement with people who are simply not around yet (and perhaps never will be). And insofar as a person finds himself in the company of others and there is conflict over how to use a given scarce resource, he must be able to resolve the problem at a definite point in time with a definite number of people instead of having to wait unspecified periods of time for unspecified numbers of people. Simply in order to survive, then, which is a prerequisite to arguing in favor of or against anything, property rights cannot be conceived of as being timeless and nonspecific regarding the number of people concerned. Rather, they must necessarily be thought of as originating through acting at definite points in time for definite acting individuals.

Furthermore, the idea of abandoning the prior-later distinction, which socialism finds so attractive, would again simply be incompatible with the nonaggression principle as the practical foundation of argumentation. To argue and possibly agree with someone (if only on the fact that there is dis agreement) means to recognize each other's prior right of exclusive control over his own body. Otherwise, it would be impossible for anyone to first say anything at a definite point in time and for someone else to then be able to reply, or vice versa, as neither the first nor the second speaker would be independent physical decision-making units anymore, at any time. Eliminating the prior-later distinction then, as socialism attempts to do, is tantamount to eliminating the possibility of arguing and reaching agreement. However, as one cannot argue that there is no possibility for discussion without the prior control of every person over his own body being recognized and accepted as fair, a late-comer ethic that does not wish to make this difference could never be agreed upon by anyone. Simply saying that it could implies a contradiction, as one's being able to say so would presuppose one's existence as an independent decision-making unit at a definite point in time.

Self-Ownership

Above the homestead principle was defined as "ownership is assigned to the initial possessor/director of any *external* good." This is important because the above analysis only works for goods which are external to the body of an acting man, it assumes that there are already acting men going into nature and extracting various goods from it. A persons body is an entirely different type of object, there aren't bodies out in nature waiting for some "soul" to come along and homestead them. Rather a body is necessarily linked to an actor. It is this objective link which imbues a man

with ownership. Homesteading is merely one form of demonstrating this link, so how do we deal with the case of establishing links between acting men and the bodies used for action?

Recall that property rights in general are conflict avoiding norms, that is to say, the very nature of ownership is to avoid conflicts. Recall also that this was derived from the nature of argumentation itself, so we can go back to argumentation to derive an assignment of property rights in bodies; for A and B to argue with each other, they have to first assume that the other guy owns himself, imagine if A tried to argue that B is actually owned by C. Well, this would mean that B would be a mere mouthpiece for C and thus A would actually be arguing with C which contradicts the presumption that A is arguing with B. Therefore, you could never propose that someone else is a slave without contradiction, in trying to demonstrate to this man that he is your or someone elses slave, you would have to first assume that he owns himself, then propose that you or someone else owns him—i.e. that he does not own himself. In other words, to engage in any argument whatsoever you have to first accept the validity of other mens claim to direct the use of their body, argumentation becomes impossible to the degree that you reject the validity of this.

Consider also the discussion above of the importance of property borders being objective and intersubjectively ascertainable. An implication of this is that particularistic norms such as A being allowed to punch B but not the other way around are false, similarly an arbitrary notion of one group owning another group must also be discarded. This is because you have an objective, undeniable-and-thus-intersubjectively-ascertainable link to your own body. To enslave someone the only way to control their body is indirectly via coercion–either physical or via threat–to get them to act how you want. In this case, the slave is still the one directly controlling their body which is a superior link to the indirect one that the enslaver has. If arbitrarily coercing others to do what you want constituted a greater claim over the body of the coerced person it would be impossible to avoid conflicts over bodies—we would rather have a system of might making right which is a conflict-authorising system of property, and thus not a rational system of property at all.

The enslaver also contradicts himself by recognising the precedence of this link over his own body by using his body to coerce his slave:

> Moreover, any outsider who claims another's body cannot deny this objective link and its special status, since the outsider also necessarily presupposes this in his own case. This is so because in seeking dominion over the other, in asserting ownership over the other's body, he has to presuppose his own ownership of his body, which demonstrates he does place a certain significance on this link, at the same time that he disregards the significance of the other's link to his own body.[28]

Furthermore, we consider that a slavery ethic–i.e. an ethic which rejects self-ownership–cannot make for a human ethic. To be an ethic for humanity, it must satisfy two properties; first, it must be universal, i.e. it must apply to all humans, and second, it must actually ensure the survival of

[28]N. Stephan Kinsella, *How We Come to Own Ourselves*, https://mises.org/library/how-we-come-own-ourselves (archived).

mankind, or else it would be an anti-human ethic, and an anti-human ethic could not be proposed without contradiction as you must first presume that you should be alive and arguing. Rothbard has pointed out[29] that if you do not have a system of total self-ownership, two possibilities remain:

1. universal and equal other-ownership, which he calls the "communist" ethic, or;
2. partial ownership of one group by another.

Universal co-ownership fails on the grounds that it would imply the near immediate death of humanity because for any person to survive they must act, and if everyone is co-owned by everyone then any given person must first ask everyone elses permission before engaging in some action, but asking permission is itself an action, therefore everyone must immediately start doing *nothing*. Further, it is not strictly possible to purposefully not act, we note that action is defined as purposeful behaviour, so even in ceasing physical motion a man is acting insofar as this ceasing is done *purposefully*. Therefore, this ethic simply cannot be obeyed no matter what a man chooses to do, as choosing any option implies action.

Partial ownership of one group by another doesn't necessarily mean the death of humanity, but it is not universal—instead of being an ethic for humans it is an ethic which implies a set of sub-humans ruled by humans. This is thus a particularistic ethic—it's a norm of the form one rule for thee and another for me. But if the partial ownership ethic was truly rational it must be able to be derived from the nature of the entities that it applies to. Thus there would have to be some principled difference between the group of humans and the group of sub-humans. We know that legal ethics are derived from argumentation, and as such they would have to apply to all beings with the potential to argue. Therefore there could be no relevant difference between different groups of humans with respect to law, as all humans qua acting being have the potential to engage in argumentation. One could come up with any number of selection criteria to split mankind into different sets; perhaps one wants to split man into different races, or nations, or into northern and southern hemispheres, etc. The point of note is that these different groups do not have different logics—so any conclusions derived that apply to arguing beings as such would have to apply to all of them.

On the Impossibility of Group Ownership

Now that we have a theory of property that accounts for both self-ownership and external ownership, we can begin to address some implications of this theory, the first of which is that ownership is necessarily individual—that is, group ownership is strictly impossible. Consider a set of people, $\{A, \cdots, Z\}$, who each commonly own a stick. What is to be done about a conflict over the use of this stick between A and B? There are two possibilities, either A is said to be the just victor, or B is. If A, then he owns the stick and B does not, if B then he owns the stick, and A does not. But both options contradict the presumption that every member in the set owned the stick, therefore group ownership simply cannot occur.

Allow me to go over some supposed solutions to this conundrum, the first of which is the democratic one. Essentially have all members within the set vote to determine who the just victor is—still,

[29] Murray Rothbard (1982), "Interpersonal Relations: Ownership and Aggression," in idem. *Ethics of Liberty*; see also Hans-Hermann Hoppe (1998), introduction to *Ethics of Liberty*.

any who lost the vote did not own the stick, as their desired possession was considered unjust. Also consider the set which only consists of A and B, what vote could possibly be conducted between these men which would not come out as A in favour of A and B in favour of B? If B voted for A or vice versa there would be no conflict, and law studies only those set of situations where there is conflict rather than those where men are in harmonious agreement about how things should be done.

The next proposal for a solution comes from Roderick Long, he sates:[30]

> On the libertarian view, we have a right to the fruit of our labor, and we also have a right to what people freely give us. Public property can arise in both these ways.
>
> Consider a village near a lake. It is common for the villagers to walk down to the lake to go fishing. In the early days of the community it's hard to get to the lake because of all the bushes and fallen branches in the way. But over time, the way is cleared and a path forms — not through any centrally coordinated effort, but simply as a result of all the individuals walking that way day after day.
>
> The cleared path is the product of labor — not any individual's labor, but all of them together. If one villager decided to take advantage of the now-created path by setting up a gate and charging tolls, he would be violating the collective property right that the villagers together have earned.
>
> Public property can also be the product of gift. In 19th-century England, it was common for roads to be built privately and then donated to the public for free use. This was done not out of altruism but because the roadbuilders owned land and businesses alongside the site of the new road, and they knew that having a road there would increase the value of their land and attract more customers to their businesses. Thus, the unorganized public can legitimately come to own land, both through original acquisition (the mixing of labor) and through voluntary transfer.

So Long provides two cases that he sees as legitimate group property; (1) where a group communally "mix their labour" with an object in nature, and (2) where a man transfers ownership of his private property to a group in common. The issue with (1) is that Long relies on the faulty labour theory of property. It is not mixing labour with land which imbues a man with ownership, as we have seen it is the nature of scarcity giving rise to the potential for conflict which implies property rights. To demonstrate the failure of this theory more thorougly, allow me to quote Kinsella at length:[31]

> As noted before, some libertarian IP advocates, such as Rand, hold that creation is the source of property rights. This confuses the nature and reasons for property rights, which lie in the undeniable fact of scarcity. Given scarcity and the correspondent possibility of conflict in the

[30] Roderick T. Long (1996), "The Ethical Argument," in idem. *In Defense of Public Space*.
[31] N. Stephan Kinsella, *Against Intellectual Property*, pp. 36–38

use of resources, conflicts are avoided and peace and cooperation are achieved by allocating property rights to such resources. And the purpose of property rights dictates the nature of such rules. For if the rules allocating property rights are to serve as objective rules that all can agree upon so as to avoid conflict, they cannot be biased or arbitrary. For this reason, unowned resources come to be owned—homesteaded or appropriated—by the first possessor.

The general rule, then, is that ownership of a given scarce resource can be identified by determining who first occupied it. There are various ways to possess or occupy resources, and different ways to demonstrate or prove such occupation, depending upon the nature of the resource and the use to which it is put. Thus, I can pluck an apple from the wild and thereby homestead it, or I can fence in a plot of land for a farm. It is sometimes said that one form of occupation is "forming" or "creating" the thing. For example, I can sculpt a statue from a block of marble, or forge a sword from raw metal, or even "create" a farm on a plot of land.

We can see from these examples that creation is relevant to the question of ownership of a given "created" scarce resource, such as a statue, sword, or farm, only to the extent that the act of creation is an act of occupation, or is otherwise evidence of first occupation. However, "creation" itself does not justify ownership in things; it is neither necessary nor sufficient. One cannot create some possibly disputed scarce resource without first using the raw materials used to create the item. But these raw materials are scarce, and either I own them or I do not. If not, then I do not own the resulting product. If I own the inputs, then, by virtue of such ownership, I own the resulting thing into which I transform them.

Consider the forging of a sword. If I own some raw metal (because I mined it from ground I owned), then I own the same metal after I have shaped it into a sword. I do not need to rely on the fact of creation to own the sword, but only on my ownership of the factors used to make the sword. And I do not need creation to come to own the factors, since I can homestead them by simply mining them from the ground and thereby becoming the first possessor. On the other hand, if I fashion a sword using your metal, I do not own the resulting sword. In fact, I may owe you damages for trespass or conversion.

Long's second case, where a man transfers title to his property to some group, fails on the grounds that it does not resolve the contradiction, therefore making that contract invalid. Contract theory will be elucidated thorougly in a future lesson, so I will not explain this point too deeply here, just note that it will be seen that contract theory arises *from* property theory, and therefore you cannot have contracts which allow for contradictory property claims, Long is essentially putting the cart before the horse.

A further potential solution for group property rights is the polycentrist solution.[32] To the polycentrist, law in a libertarian society is decided by reference to competing arbitrators, these judges could settle disputes and thus determine the arrangement of property. So for our above example of $\{A, \cdots, Z\}$ all collectively owning a stick, they would simply have to go to some judge

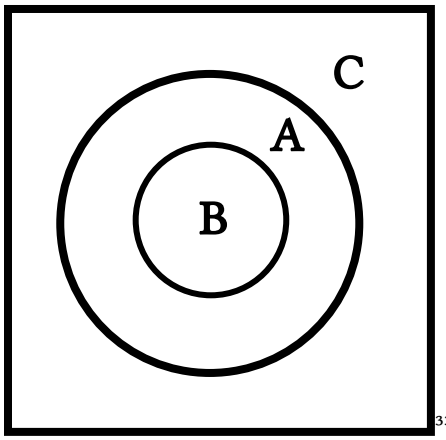
[32]See my video *David Friedman is Not an Ancap* for more on this: https://www.youtube.com/watch?v=DRA6rLvHARE

to decide who has just possession. The problem with this is first that it is confused about the nature of law—justice cannot be decreed by man, rather it depends on the normative structure of argumentation. And second, the contradiction is still not resolved, if this Judge rules in favour of A, B did not own the stick and vice versa.

Companies are often forwarded as a counterexample to this thesis—it is said that multiple people can come together and own shares in a given enterprise and thus communally own said enterprise. This counterexample is confused about what a company is—men do not go out into nature and find companies which they then homestead, rather companies are specific relationships between men, they are constructed via a web of contracts. Just as a person cannot own friendship or marriage they cannot own a firm, not legally at least. The specific property being directed by the company must be owned by a single individual, perhaps the CEO or another such person. This does not mean the CEO can do whatever he wishes with this property, it may be the case that there is a contract such that if he uses the property for purposes contrary to the shareholders voted-upon goal then the title to that property is transferred to some other person who then becomes the CEO. Nowhere in such a conception is any property owned by multiple people.

The Blockean Proviso

There is a potential conundrum for this theory of homesteading which goes as follows:



[33]

There are three sections of land, $\mathbb{A}$, $\mathbb{B}$, and $\mathbb{C}$ as pictured. Crusoe comes along and homesteads $\mathbb{A}$. Friday currently resides somewhere in $\mathbb{C}$. Because Crusoe does not own $\mathbb{B}$, Friday does not have a duty to Crusoe to not enter it. And because Crusoe does own $\mathbb{A}$, Friday does have a duty to Crusoe to not enter $\mathbb{A}$. So, Friday is allowed to enter $\mathbb{B}$, but not $\mathbb{A}$. However, due to the donut shape of Crusoes homestead, to enter $\mathbb{B}$ implies entering $\mathbb{A}$, hence, a contradiction arises—Friday both has a duty not to enter $\mathbb{B}$ and he does not have said duty. That is to say, Crusoe is acting like he is the owner $\mathbb{B}$ of when he is in fact not—this is called forestalling. The proposed solution put forward by those in the Walter Block camp is the Blockean Proviso. Essentially, they claim that the contradiction arises from assuming that Crusoe has indeed homesteaded all of $\mathbb{A}$, therefore to resolve the contradiction these donut homesteads must be disallowed. This formulation, provided

[33]This diagram comes from Łukasz Dominiak (2017), *The Blockian Proviso and the Rationality of Property Rights.*

by Łukasz Dominiak, resolves a counterargument made by Kinsella,[34] where he imagines that the donut is not owned by Crusoe himself, but by 100 Crusoes we could call Crusoe1 through to Crusoe100, which of these individual segments does Friday have the right to cross over and why not any of the others? Surely if they each sequentially homesteaded their individual segments, none of them are individually forestalling. The solution to this is that it is Crusoe100, who seals up the donut who has committed a crime, as he was not able to homestead that final section.

However, there is a way to resolve this contradiction without any need for a proviso, as Kinsella writes in defense of embordering-as-homesteading, utilising de Jasay's "let exclusion stand" principle:[35]

> In a nutshell: de Jasay equates property with its owner's "excluding" others from using it, for example by fencing in immovable property (e.g. land) or finding or creating (and keeping) movable property. Thus, the principle means "let ownership stand," i.e., that claims to ownership of property appropriated from the state of nature or acquired ultimately through a chain of title tracing back to such an appropriation should be respected. De Jasay uses this idea to demolish the criticism that homesteading unowned resources unilaterally and unjustifiably imposes on others moral duties to refrain from interfering.

I.e. it is the very nature of property itself that the owner excludes others from using it, we can then say that Crusoe in excluding others from accessing this previously unowned territory $\mathbb{A}$, thereby becomes its owner. It is this act of exclusion which *is* Crusoe initially directing the use of both the donut and the donut-hole. This idea of "let exclusion stand" sheds light also on the falsehood of the notion that property rights must be limited because if they were not I would be permitted to use my gun to shoot an innocent man. This is false because my property right in that gun does not mean that I am allowed to use that gun for whatever I want, it means that I have a right to exclude people from using the gun for what they want. This isn't particularly surprising either, I would also not be permitted to use a stolen gun to shoot someone, who owns the gun being used for the shooting isn't relevant to the question of whether the shooting is just or not. Kinsella goes on:

> Note that the de Jasayan idea of "let exclusion stand" or the Hoppean idea that the prior-later distinction is of crucial importance also sheds light on the nature of homesteading itself. Often the question is asked as to what types of acts constitute or are sufficient for homesteading (or "embordering" as Hoppe sometimes refers to it); what type of "labor" must be "mixed with" a thing; and to what property does the homesteading extend? What "counts" as "sufficient" homesteading? Etc. And we can see that in a way the answer to these questions is related to the issue of what is the thing in dispute. In other words, if B claims ownership of a thing possessed (or formerly possessed) by A, then the very framing of the dispute helps

[34] Łukasz Dominiak (2017), *The Blockian Proviso and the Rationality of Property Rights* citation (Long 2007).

[35] N. Stephan Kinsella, *Thoughts on the Latecomer and Homesteading Ideas; or, why the very idea of "ownership" implies that only libertarian principles are justifiable*, https://mises.org/wire/thoughts-latecomer-and-homesteading-ideas-or-why-very-idea-ownership-implies-only-libertarian (archived).

to identify what the thing is and what counts as possession of it. If B claims ownership of a given resource, he must want the right to control it according to its nature. Then the question becomes, did someone else previously control it (according to its nature); i.e., did someone else already homestead it, so that B is only a latecomer? This ties in with de Jasay's "let exclusion stand" principle, which rests on the idea that if someone is actually able to control a resource such that others are excluded, then this exclusion should "stand." Of course, the physical nature of a given scarce resource and the way in which humans use such resources will determine the nature of actions needed to "control" it and exclude others.

De Jasay, as a matter of fact, considers two basic types of appropriation: "finding and keeping" and "enclosure." The former applies primarily to movable objects that may be found, taken, and hidden or used exclusively. Since the thing has no other owner, prima facie no one is entitled to object to the first possessor claiming ownership.

For immovable property (land), possession is taken by "enclosing" the land and incurring exclusion costs, e.g., erecting a fence (again, similar to Hoppe's "embordering"—establishing an objective, intersubjectively ascertainable border). As in the case with movables, others' loss of the opportunity to appropriate the property does not give rise to a claim sufficient to oust the first possessor (if it did, it would be an ownership claim).

So in the case where Friday is in $\mathbb{C}$, Crusoe instantly becomes the owner of both $\mathbb{A}$ and $\mathbb{B}$ after he completes his embordering. In the case where Friday is in $\mathbb{B}$, assuming nobody else is in $\mathbb{C}$, Crusoe would become the immediate owner of both $\mathbb{A}$ and $\mathbb{C}$, but what of the case where there are people or homesteaded property in both $\mathbb{B}$ and $\mathbb{C}$? In that situation, it becomes clear that Crusoe would indeed be forestalling in fencing off $\mathbb{A}$, as he *could not* become the owner of the owned property on either side of his border. That is to say, this type of fencing off, would be claiming possession of not unowned land, but of the owned property of others.

Direction vs Possession: What is Ownership?

I have come to recognise a slight terminological problem regarding the definition of "ownership." Initially for this course I defined ownership as just possession, that is to say that A owns α if A can justify his possession of α. This terminology strikes me as being entirely reasonable on its face, and for some purposes–such as the discussion of homesteading above–it works perfectly fine.

However, there are some issues with using "just possession" as your definition of ownership. First how does one apply this terminology to situations where there is no conflict and yet the owner of a thing is not in possession of it. Consider inviting your friend over to watch some TV, your friend sits on your sofa and thus he is engaged in some partial possession of the sofa, and of the sitting room. Given there is no conflict, could you ask your friend to leave if you no longer want him to sit there? Well, he was able to justify his possession of his sitting room so did he not therefore own it? And if he owns it, what right have you to tell him to leave?

This issue could be solved through some notion of antecedent vs descendant property rights,[36] i.e. your property right in the sofa and the sitting room is antecedent to your friends right, and

[36] Such an idea is used in: Kris Borer (2010), "The Human Body Sword," *Libertarian Papers* 2, 20.

the antecedent right must prevail in a given conflict. I have no particular issues with others using this terminology, but it would make the wording of the above proof that ownership is exclusive a little bit tedious for my liking. As such in this course I shall use the terminology that ownership is just direction, which is analogous to de Jasay's idea that ownership of a thing involves controlling it and it is also reminiscent of the Misesian definition of socialism as being a society wherein a single will directs the factors of production. Furthermore defining ownership in terms of who has the right to control or direct a given property will be useful in later lessons when describing the right to retribute and the right of guardianship as property rights—these things are scarce and so our property theory has to cover them, but they aren't physical, so it is odd to describe them in terms of possession.

On the Impossibility of Intellectual Property Rights

This course would be incomplete without at least a brief treatment of so-called intellectual property rights, though this section will indeed be brief as I already have an extensive video going over the topic.[37] All that shall be covered here is a proof that intellectual property rights are impossible and are rather monopoly grants and a brief demonstration that said intellectual monopoly grants are per se criminal.

First to demonstrate that "intellectual property rights" are impossible, consider the nature of property. To say that person A has a property right in X is to say that he should win any conflict over the use of X. The issue with so-called intellectual property then is that ideas are not scarce, so there cannot possibly exist property rights over ideas. If Crusoe finds a stick in nature and figures out how to use it to fish, his use of the stick excludes Friday, but his use of the idea of spearfishing does not—Friday is fully capable of finding a *different* stick and using that to spearfish at the exact same time. We notice that Friday needs to find a different *stick*, but he does not need to find a different *idea*. One person having an idea excludes nobody else from having that same idea, so conflicts over ideas are strictly impossible.

Should Crusoe exclude others from using this idea of spearfishing, he is not acting in defense of a property right, therefore. Instead he is criminally threatening and/or attacking others who want to spearfish. If a man comes up with a mousetrap design and patents it, then claims to everyone else that they are now not allowed to make this type of mousetrap, he is indirectly threatening everyone else with violence, through the use of the state. Intellectual property therefore constitutes a criminal threat, and crime is something to be opposed.

Furthermore, to adopt a consistent intellectual property ethic is to accept ethical stasis—the IP ethic could be stated that any latecomer to an idea must ask the firstcomer to that idea–or their heir–for permission before using it. But then anyone who is not the first person to get the idea to ask permission to use ideas must first ask his permission to ask permission, which they cannot do without first asking permission to ask permission to ask permission, and so on ad infinitum. The IP ethic, then, implies the near immediate cessation of all action, and thus implies the death of humanity, so the IP ethic simply cannot make for a human ethic.

[37] See LiquidZulu, *Why Artists Shouldn't Own Their Art*, https://www.youtube.com/watch?v=4xKjHHzLUQQ

Related Reading

- LiquidZulu, *Georgists Don't Understand Rights*, https://youtu.be/1iH4FqMDE0Y
- Łukasz Dominiak (2017), *The Blockian Proviso and the Rationality of Property Rights*.
- N. Stephan Kinsella, *Thoughts on the Latecomer and Homesteading Ideas; or, why the very idea of "ownership" implies that only libertarian principles are justifiable*, https://mises.org/wire/thoughts-latecomer-and-homesteading-ideas-or-why-very-idea-ownership-implies-only-libertarian (archived).

Contract Theory

The proper theory of contracts deals with the question of when a given transfer of title to property is legitimate and thus justly enforceable. This theory illuminates the answer to certain pernicious questions such as: can a man sell himself into slavery? Is fractional reserve banking legitimate, or a form of fraud?

> The right of property implies the right to make contracts about that property: to give it away or to exchange titles of ownership for the property of another person. Unfortunately, many libertarians, devoted to the right to make contracts, hold the contract itself to be an absolute, and therefore maintain that any voluntary contract whatever must be legally enforceable in the free society.
>
> —Murray Rothbard[38]

The Title-Transfer Theory of Contracts

As stated in the opening quote, property theory lies antecedent to contract theory—that is, the right to make contracts is implied by the right to own property, and not the other way around. First, recall that property rights are conflict-avoiding norms, the owner is said to be the man who can justly control the resource in question. But these ownership rights are not set in stone, the owner of a property may abandon it or transfer title to it to someone else—consider Crusoe leaving his stick to rot after he has finished spear fishing, if he no longer considers it to be a good which he is acting with, Friday is capable of possessing it without there being any conflict. In other words, owning a thing involves actually possessing it along with the intent to direct the use of it, if you lose this intent you no longer own it. This is abandonment, where a property is simply ceded back to nature, ripe for someone to homestead it—recall that such abandonment must be objective and intersubjectively ascertainable. The latter case, of a man transferring title to someone else is the subject of the theory of contracts. The question of concern is what types of contracts are enforceable and why.

Allow me to first construct the basic case of Crusoe transferring ownership of his stick to Friday. For this to be a transfer and not an abandonment, Crusoe must relinquish control at the same time that Friday takes up control, and each man must have the goal of the transfer going forth —that is to say, there exists no time between Crusoe and Fridays ownership where the stick was unowned. This means that a third man, Xury, could not come along and quickly swoop in on the

[38] Murray Rothbard, "Property Rights and the Theory of Contracts," p. 133, in idem. *The Ethics of Liberty*.

property and thereby homestead it. It is clear that Friday now has title to the property. In short, a transfer of title to the stick from Crusoe to Friday involves Crusoe abandoning the stick at the same time that Friday homesteads it. What makes this transfer an enforceable contract, is that if Crusoe does not physically go through with giving the stick up he has implicitly committed theft —the stick belongs to Friday now and Crusoe is using it against Fridays consent. This is because Crusoes agreement to the contract is evidence that he wishes to relinquish control–to abandon the stick–he cannot deny this without contradiction.

It is therefore those contracts where defaulting would imply aggression that are enforceable. Consider a mere promise, say a woman agrees to marry her boyfriend but does not go through with it—she has gone back on her word, but she has not violated the boyfriends rights, therefore mere promises like this are not enforceable. A promise is only enforceable to the extent that it implies a transfer of property titles—in such a case the property may be re-possessed by its now-owner.

This theory of contract is called the "title-transfer" theory for this reason—to sum up, only those contracts which define the terms of the transfer of title to *alienable* property are legitimate. Furthermore, *conditional* transfers are also legitimate, say that Crusoe agrees to transfer title to the stick to Friday on the condition that Friday performs a dance. Upon Friday meeting the condition set forth by Crusoe, title to the stick is transferred to him—this is because the intention was made clear by both Crusoe and Friday that Friday is the just director of the use of the stick upon the condition being met. It will be seen in a later lesson why Crusoe would be "estopped" from challenging Fridays ownership—that is to say, Crusoe could not coherently deny that Friday owns the stick upon the condition being met. What is important is that on this theory a contract is not a piece of paper, the piece of paper is rather evidence of a contract existing, the contract can be verbal, agreed to via semaphore, or any manner of other methods of communication—all that a piece of signed paper can do is serve as evidence that a given contract was communicated and agreed upon by the parties in question.

An interesting implication of this theory is that there isn't really such a thing as "breaching" or "breaking" a contract. If A and B agree that B will transfer to A a sum of 10 ounces of silver on the condition that A performs magic at B's birthday party, A has not violated B's rights by not showing up, if B wanted to encourage A to go through with the deal he simply need bake in a penalty clause stating that A transfers to B a sum of 5 ounces of silver if he does not perform the magic. Still here, A does not "breach" the contract by not showing up, he has simply engaged in an action which the contract covers. The aggression would only be if doesn't perform and doesn't hand over the 5 ounces, not because this would breach the terms of the contract, but because this would be a theft of 5 ounces of silver.

Consider further the case of Smith agreeing to pay 50 lbs of gold for Jones' car, Smith takes the car but refuses to hand over the 50 lbs of gold to Jones, has Smith stolen the car or the 50 lbs of gold? Well, if Smith actually has 50 lbs of gold then title to it was instantly transferred to Jones upon the contract being accepted, thus it is the gold that has been stolen. On the other hand if Smith does not have 50 lbs of gold then the condition for the transfer of the car has not been met, so Jones still owns the car and that is what Smith has stolen.

Fraud

Fraud can be defined as theft-by-trick, i.e. it is a theft performed by deceiving the victim. Consider the example where Crusoe has blunted the tip of his spear and that's why he wants to get rid of it, Crusoe lies to Friday and claims that the spear is as sharp as a razor, this is fraud—Crusoe has deceived Friday about the nature of the spear. This means that this was not a valid contract, Crusoe did not have the intention of transferring title to a sharp spear to Friday and therefore the contract is null. If Friday had given Crusoe some sea-shells in exchange, Crusoe has implicitly stolen those shells.

A particularly prevalent example of fraud is found in fractional reserve banking;[39] the fractional reserve bank keeps only some fraction of the money deposited and loans out the rest. Consider a full reserve bank; various people come and deposit 100 ounces of gold, and the bank therefore gives these depositors in total certificates for 100 ounces of gold. Here there is a one-to-one correspondence between titles to the gold–evidenced by the certificates–and actual gold in the vault. Consider what would happen if this bank decided to implement an 80% reserve policy, and they therefore loan out 20 ounces of gold, this would mean that the bank has stolen that gold, because there was already a one-to-one correspondence between property titles in the gold held by depositors and actual gold in the vault—therefore the bank is committing fraud in deceiving people into the belief that they actually hold title to that gold. Perhaps instead of physically loaning out the gold they keep all the gold they have, but they give out 20 ounces worth of certificates for gold; this would also be fraud because there would be 120 ounces worth of titles to gold, but only 100 ounces of gold—more property titles than actual property implies that people are being deceived about the actual nature of the property in existence, which therefore means there must be fraud.

Often, so-called "free-banking" supporters will hold that the right of people to make whatever contracts they expect to be advantageous means that such fractional reserve banks are not criminal institutions, but as we have seen these people are misunderstanding the nature of property and contracts. It is not the case that one is able to make whatever contract they want so long as everyone agrees to it, property theory lies antecedent to contract theory, therefore a contract which misrepresents the actual nature of property in existence is invalid. This is not to say that a fractional-reserve casino game is fraudulent, but representing this casino game as a bank is. A bank is a money-warehouse, not a casino game. Such a casino game would not involve people depositing *their* money in *their* account and retaining title as evidenced by money substitutes, such a game would involve people transferring their money *to the casino* in order for the casino to engage in some gambling algorithm with it. So fractional reserve *banking* is fraud, fractional reserve roulette is not—the definition of fraud in terms of deception is another concept that highlights the importance of communication to libertarian theory. Just as me loaning my friend 5 ounces of silver is not me depositing my money in an account held by my friend, it is me transferring that silver to him, so too is me placing a bet with a casino not me depositing money in an account, it is me transferring that bet to them.

[39] On this, see Hans-Hermann Hoppe, Jörg Guido Hülsmann, Walter Block, *Against Fiduciary Media*; see also MRH Legacy, *From Barter To Bitcoin: A Theory of Money*, https://www.youtube.com/watch?v=RZdJdfXL6K4

Debtors Prison

This concept of a loan is relevant to the question of debtors prison. The question is twofold; first if A loans B 1000 ounces of silver in exchange for 1050 ounces in one years time but B defaults has he stolen from A, and second would A be permitted to put B to work in a debtors prison to pay off this stolen sum? For the former question, if it is the case that B has stolen from A, *what* has he stolen—the 1000 ounces or the 1050 ounces? He surely hasn't stolen the 1000 ounces because that money was transferred to him at the time of the contract such that he could invest it in his various projects, if it was not transferred there would be no loan in the first place. It also cannot be the case that it wasn't theft at the time but it is retroactively at the time when he defaults—a property theory must assign a definite owner to any scarce resource at all times, if retroactive theft is such a thing in your property theory there exists Schrödinger's property who's owner cannot be determined right here and now such that conflicts over its use may be avoided. Schrödinger's property must therefore be expelled from our rational theory and as such the notion of retroactive theft must also. The question here is who owns the 1000 ounces immediately after the contract is accepted, A or B? If A then B has no right to invest these funds and there is no contract to speak of. If B then it cannot be that B has stolen the 1000 ounces because he had title to it.

Furthermore, it also can't be said that B has stolen the 1050 ounces, for if B has defaulted that means he does not possess 1050 ounces of silver so how could he possibly have stolen it if it doesn't exist? Of course, if B actually does possess said sum and simply refuses to hand it over, this is not strictly speaking a default on the loan, it is rather B stealing that sum of money. These future-oriented contracts are called aleatory contracts, they have an implied clause of "unless its impossible," this is because the future is uncertain—just as you cannot contract to transfer title to a square circle, you cannot contract to transfer money that doesn't exist, so in such loan arrangements there must be an implicit condition that the funds actually exist on the due date. After all, what if B was vapourised in a nuclear explosion along with the funds one week after the contract was accepted. Upon the money coming due has the now-dead B robbed A from beyond the grave? What if everyone except A died in the explosion—if nobody else exists it is nonsensical to speak of anyone being criminal towards A.

In short its not theft unless something was stolen, and its not fraud unless there was deception—there is no deception in the case of an aleatory contract on the part of B as he is not deceiving A into thinking that he has what he does not. Everyone knows that the future is uncertain, B has made no claims to the contrary.

Whilst it is not relevant to legal theory as such how A can successfully get around this hurdle I think it is important to give some notion as to how future-oriented contracts are still possible and reasonable. First, A need only bake in some interest clause, perhaps each month that passes B owes A a further 1% on top of the initial 1050 ounces such that when B acquires the requisite sum of money title to it is immediately transferred to A. Furthermore, it is not the job of law to make sure that A makes a profit on the loan, some loans go bad, it is an entrepreneurial activity and as such it is per se uncertain. The fact that the loan goes bad and A doesn't make a return is not sufficient grounds to justify A locking B up in a prison and working him as a slave.

Voluntary Slavery

With our solid understanding of contract theory, we can analyse the debate surrounding "voluntary slavery" and determine the correct answer. The debate essentially centres around whether a mans self-ownership is alienable or not, that is to say, the question is whether it is legitimate to transfer ownership of oneself to another person. the former view is most notably held by Walter Block, and it can be summed up as follows:[40]

> The underlying point of the libertarian critique is that if I own something, I can sell it (and should be allowed by law to do so). If I can't sell it, then, and to that extent, I really don't own it. Take my own liberty as perhaps the paradigm case of the debate over inalienability. The claim is that if I really own my liberty, then I should be free to dispose of it as I please, even if, by so doing, I end up no longer owning it. Clearly, since I cannot own a square circle, I cannot sell it. If I can own my own ability to give true love, then I can sell it; if I logically cannot own this attribute, then, of course, I cannot give, barter, or sell it to anyone else.
>
> My thesis: No law should be enacted prohibiting or even limiting in any way people's rights to alienate those things they own. This is "full monte" alienability, or commodification.

So, for a voluntary slavery contract to be legitimate, (1) you must own yourself in the first place and (2) you must be able to sell yourself. Walters contention with other libertarians is that there does not exist objects which are ownable but not sellable—the standard example of a contract pertaining to the sale of a square circle is illegitimate because you can't own a square circle in the first place. This would imply that because people own themselves in the first place, they can therefore sell themselves.

A prominent counter-argument to this thesis was forwarded by Rothbard in his *Ethics of Liberty*:[41]

> The distinction between a man's alienable labor service and his inalienable will may be further explained; a man can alienate his labor service, but he cannot sell the capitalized future value of that service. In short, he cannot, in nature, sell himself into slavery and have this sale enforced—for this would mean that his future will over his own person was being surrendered in advance. In short, a man can naturally expend his labor currently for someone else's benefit, but he cannot transfer himself, even if he wished, into another man's permanent capital good. For he cannot rid himself of his own will, which may change in future years and repudiate the current arrangement. The concept of "voluntary slavery" is indeed a contradictory one, for so long as a laborer remains totally subservient to his master's will voluntarily, he is not yet a slave since his submission is voluntary; whereas, if he later changed his mind and the master enforced his slavery by violence, the slavery would not then be voluntary.

[40] Walter Block (2014), *Toward a Libertarian Theory of Inalienability: A Critique of Rothbard, Barnett, Smith, Kinsella, Gordon, and Epstein.*

[41] Murray Rothbard, "Interpersonal Relations: Voluntary Exchange," pp. 40-41, in idem. *The Ethics of Liberty.*

There are several ways a Blockean might respond to this attack, first they could point to the frontal lobotomy as a procedure which makes a person akin to an animal in terms of thinking. Perhaps there could be a pill or machine invented in the future which would nullify only those parts of a mans brain which are responsible for his conceptual abilities—surely a man who underwent a procedure such as these would have indeed–potentially permanently–subdued his will such that he may be more effectively directed by his enslaver. This would mean that voluntary slavery is not per se illegitimate, but rather is only illegitimate where men cannot figure out how to subdue the slaves will. Furthermore, it is not the will which is relevant to a voluntary slavery contract but the body, so even if it is logically impossible to transfer the will of person A to person B, it may *not* be the case that its impossible to transfer the body from A to B. After all, both the supporters and rejectors of the right to make slave contracts agree that it is possible to have someone as your slave—that is to say its possible for B to possess A, the question is whether it's possible for this to be a *just* possession.

And on this note, let us recall the nature of a mans self-ownership. A body is necessarily and objectively linked to an acting man, and it is this link which imbues a man with ownership. Any time you argue with anyone you must assume the primacy of this link and its validity in making the other person own their body. It is the argument from argument, then, which demonstrates the inalienability of the self. That is to say, ownership is just control, which means *argumentatively justifiable* control, and the very nature of argumentatively justifying anything implies a mutual recognition of self-ownership, therefore a master cannot justly possess his slave making voluntary slavery a contradiction in terms. Block rejects this notion of an objective-link establishing ownership, stating the following:[42]

> Let us posit you have a dog who is heart and soul with you. K9 dogs are said to have this sort of connection with their masters. According to Kinsella, not only would it be illegal to sell this dog [...] but, also, well-nigh logically impossible for this to occur. Just as we all "have the best link to my body", you, too, have the best link to this dog. You snap your fingers, and the dog does your bidding, not that of the neighbor, to whom you have sold the dog. The point is, "the best link to, in terms of control," is clearly way outside the bounds of libertarian homesteading and property rights theory. Merely because someone has "the best link" to something, does not mean he is necessarily the legitimate owner of it [...]

But the dog is clearly disanalogous to the human case—a dog is an external object, not a (human) body. What we have in the case of a dog that A wants to sell to B is a case of either A or B "coercing" the dog to do their bidding. The dog is analogous to a machine-gun that A may well be more adept at using—the point is not over who is more scientifically capable of using the object for some end though. If the dog was capable of acting and arguing then indeed it would be a contradiction to assert that either A or B could own the dog, as they would have to recognise the dogs self-ownership. This is because the dog would then have an objective and undeniable link to his own dog-body. The dog has no such link in reality because he cannot act or argue—

[42] Walter Block, "Rejoinder to Kinsella on Ownership", *MEST Journal* Vol. 11 No.1, pp. 1-8

the dog is in the same legal category as a machine-gun. It may well be the case that A is more capable of using the dog for certain ends, but this is not enough to demonstrate a link as strong as is between an actor-arguer and his own body.

Moreover, a first-principles understanding of contract highlights the fact that for A to transfer title of α to B, A must relinquish control–i.e. abandon α–at the same time that B takes up control. You cannot abandon your body without making yourself braindead, so you cannot–whilst remaining an actor–transfer title to your body. After all, such abandonment of the property would have to be objective and intersubjectively ascertainable, merely decreeing that you no longer own yourself is not enough. What this means is that voluntary slavery is an impossibility, insofar as you do make yourself braindead and thus non-existent in the praxeologic sense you cannot be said to consent or not consent to anything. It is not proper to say that the stick I appropriate from nature is consenting or not consenting to be my slave—it is a stick, not a moral being capable of consent. Therefore, the closest one can get to voluntary slavery is to render the so-called "slave" incapable of action or argumentation, to completely destroy their will in Rothbardian terms, and thus make this person legally analogous to a corpse.

Rothbard therefore already had the shape of this idea in his mind, but spoke of it using the confusing terminology of will-transfer, as Block says, "will schmill!"[43] Whether you can literally transfer or suppress the will of an acting being isn't relevant, what is relevant however, and what Rothbard was on the cusp of, is that consent does matter. Merely promising in the present that you will do whatever your master says, that you will be their slave, does not mean that they own you—mere promises do not establish this, you can always change your mind in future and revoke consent. Consider the case of your girlfriend agreeing to have sex with you tomorrow after dinner, the time comes and you are getting ready to do the deed but she changes her mind and tells you that she no longer wants to go forward with the arrangement. But is she not my slave for the purposes of this contract? She agreed before that she would obey my wishes on this matter, so am I permitted to have sex with her or would this be rape? Clearly the latter is true—just because she gave consent before does not imply that she cannot revoke said consent. The same is true for all voluntary slavery, merely agreeing now to always obey the masters wishes does not transfer ownership of anything. The Rothbardian analysis is also absolutely correct in that demolition of the will would allow a body to be owned by another, but only because this demolition of will would render the individual analogous to a corpse.

It is therefore not all that surprising that one cannot sell their body (whilst remaining alive), after all as discussed earlier, the two methods of alienation are title-transfer and abandonment, we already accept that its not possible for an actor to abandon their body, what the above analysis shows is that it's also not possible to alienate your body through title-transfer either. Moreover, as discussed above, for title-transfer to be possible in the first place you have to be able to abandon the thing in question. If A wants to transfer title of α to B, what A must do is abandon title to α at the same time that B takes up title to α, this first step of abandonment cannot occur in bodies, and therefore ownership of bodies cannot be transferred. The only exception is when the person in question dies or is rendered braindead, at this point their body is indeed abandoned to nature

[43] ibid.

and as such the only valid way to transfer title to your own body is by doing so in a last will and testament.

It is a mistake to see property in external objects as being equivalent to property in bodies and then using the fact that you can trade external objects to claim that you can also trade bodies—ownership is the right to control a scarce resource, it takes an additional step to say that you can give up that right or that other people could take it. The confusion on this matter is derived from a conflation between two different senses of the word "ownership." In this course great attention has been paid to the legal sense of this word, but there is also such a thing as catallactic ownership, which is the sense used by economists. This is why an economist may say something like, "A sells his labour services for 5 ounces of gold to B," to the legal theorist such a sentence is incoherent, the labour isn't owned by anyone and thus it isn't being traded—it doesn't make sense to say that someone owns their labour, labour is something that you do with things that you own. After all, what would it mean to exclude someone from your labour? Thus in the legal sense this is clearly ludicrous, but the economist does not mean the same thing, what the economist means by ownership is more akin to possession, or control, as the economist is not concerned with whether said control or possession is just. A certainly does control his labour, at least in the economic sense, he can choose to employ his labour for whatever line of production he sees fit, and in the economic sense it makes sense to speak of him trading this labour with other people, but one should not then bring such an analysis into legal matters, such would be a dreadful mistake. The voluntary slavery contract is the paramount example of this mistake, Blocks argument hinges on the notion that if you own something you can sell it and vice versa. But it is simply not the case that ownership implies selling or that selling implies ownership. I can sell a bitcoin, or an idea, or my labour, and yet I do not *own* any of these things in the legal sense. Similarly owning something does not imply the right to sell it, as has been seen with the case of ones body.

The Last Will and Testament as a Contract

It is possible to alienate some parts or even all of your body though—consider Crusoe chopping off his arm. Upon chopping the arm off it is alienable, Crusoe is able to abandon or trade it at will, because he is no longer objectively and undeniably linked to his arm. A similar case exists with respect to ones entire body in the case of death. If Crusoe sets to paper that upon the condition that he dies, ownership of his body is transferred to Friday, then this is a legitimate contract. The instant the condition is met Crusoes body becomes alienable just as surely as a stick or a sea-shell. There could be no remaining objective link between Crusoe and his body at this point because Crusoe has perished—he no longer possesses the potential to engage in any form of argumentation, and as such third parties are not in contradiction by claiming to own him. This highlights why a last will and testament is a legitimate contract in general—simply set the condition for whatever title-transfers the will defines to be the death of the owner. Should a man die who has no inheritors his property–including his body–becomes instantly ceded to nature, ready for someone to homestead it. Therefore if a man wishes his corpse be treated in a certain way he must transfer title to it to trusted family or a funeral home.

Related Reading

- Łukasz Dominiak and Tate Fegley, *Contract Theory, Title Transfer, and Libertarianism*

- N. Stephan Kinsella, *A Libertarian Theory of Contract: Title Transfer, Binding Promises, Inalienability*

The Rights of Children

The theory of the rights of children is far too often overlooked or infected with irrational cultural norms. This is true even for the comparatively more thorough libertarian theory of law. A rational theory of the rights of children must be elucidated for a given legal theory to be complete.

> From its inception, libertarian theory has had an enormous problem standing before it: how to reconcile the existence of developing self-owners within the framework of property rights and non-aggression. It is not at all obvious how the rights of children, or lack thereof, are to be derived from the aforementioned principles. It is all too easy for subjective cultural values concerning children to sneak their way into an otherwise sound argument. In order to develop a rational theory on this topic, these seemingly self-evident attitudes must be identified and dismissed. Similarly, it is imperative to reject the "wisdom of repugnance" which would dismiss a rational theory solely on the grounds that it produces conclusions abhorrent to the popular mores of a given society.
>
> —Ian Hersum[44]

The Groundwork

To develop a theory of the rights of children, we must understand what the nature of a child is. First we recognise that it is not physical, but mental development which defines childhood—parapalegics such as Stephen Hawking are incapable of commanding their body to do certain tasks but they may still be adults. Though these disabled individuals lack certain abilities seen in most humans, they do not lack the characteristic mark of action, they merely lack the ability to wield many means which others take for granted. So it is psychological as opposed to physiological immaturity which is the defining mark of childhood.

From this we can deduce a fact about the nature of childhood, namely that it is not a switch which once flipped cannot be flipped back; it is certainly possible for a given person to move in and out of psychological maturity throughout the course of their life. Consider a sleeping man, certainly this individual is–perhaps temporarily–psychologically immature. That is to say, this individual is not capable of negotiating for his own care, and instead requires others to do so for him. This is especially relevant in the hypothetical scenario of an unconscious man lying in the snow and freezing to death. Often libertarians will clumsily tack on a theory of implicit consent or implicit contract to deal with such scenarios—the former relies on an arbitrary notion of what a "reasonable" person would consent to and is thus not rational, and for the latter it is not clear what titles are being transferred. For the theory presented here[45] this unconscious person being taken to the hospital by a paramedic is analogised to a mother carrying her toddler.

[44] Ian Hersum (2020), *A Rational Theory of the Rights of Children*

[45] See ibid.

Note that this guardianship role taken up by the paramedic and the mother respectively is scarce and therefore it must be held singly by the homesteader as has been shown in this course. This is because there can be conflicts over the specific minutia of how the guardianship is to be performed. A direct implication of this is that counter to the common view that fathers should have just as great a say over the child as the mother, naturally the mother must be the homesteader of the guardianship as she has greatest proximity—from the moment the baby comes into existence it is being cared for by its mother, this is not true of the father.

To capture the nature of a child as a psychologically immature human, we can define childhood as the state of being incapable of expressing one's own will and the guardian is the man who takes it upon himself to preserve the child until such a time that they gain the ability to express their will. Ian Hersum analogises this to an encrypted last testament:[46]

> […] imagine the scenario of an encrypted last testament (being consequentially analogous to one's premature will), which an interested party agrees to decrypt over time. What is to be done with the estate during that time? It must doubtless not be damaged or consumed until such a time as the will has been entirely decrypted, with its voluntary manager responsible for preserving it in the interim. Should it be damaged or consumed during that period, either by the manager or by a third party, whoever has done such damage or consumption would be held liable, and that person would be disqualified from managing the property in the future, provided that someone else is willing to assume that role. As such, anyone who harms a child should be held liable for the damage done and be forbidden from being the guardian of that child in the future, provided that someone else is willing to assume that role. As bits and pieces of the will are decrypted, the estate manager would be obligated to follow any instructions which are capable of being understood with the information available at the time. As such, as a child develops, his guardian is obligated to relinquish authority over to the child in domains of behavior which the child can express his informed will on. In a contention between a child and his guardian over such authority, a court can listen to the testimony of the child in order to determine if he truly understands that which he is saying, or if he is merely blathering on about a decision which he lacks the comprehension necessary to make.

This analogy highlights some key observations, first the reason why it is just to subject a child to life-saving surgery is that this action is preserving their natural state until such a time that they are able to express what they want done to their body—this applies also to any surgeries which do not necessarily save the childs life, but take the child closer to that natural state. This is entirely different to a cosmetic surgery, which alters the childs natural state. Consider the example of circumcision, you do not know whether the boy wants the circumcision performed, so assuming it would not save his life, you are criminally damaging him. That is to say, you cannot *assume* any facts about what the child would will on any subject to do with their natural property (aka their body), therefore the only actions you can perform to that property is to preserve it until its

[46] ibid.

owner is able to state what he wants done with it. To be clear; the guardian of a child is not the owner of that child, rather he is "the owner of the exclusive right to raise that child."[47]

So the reason why a paramedic is allowed to resuscitate an unconscious man is that this is preserving his body until such a time that the man may state what he wants done with it. A caveat with the unconscious man is that he was at one point presumably an adult able to state his will, and if he had stated that he does not wish to be resuscitated, his will on that matter is known, and thus it would be criminal to go against such an order. It is only on matters where the child's will is unknown that you may take the preserving action.

Furthermore, as the guardian is not the owner of the child itself, but rather the owner of the right to protect that child, any abuse performed by the guardian unto the child implies an abandonment of that right, implying that the guardian must notify interested parties that the child is available for adoption. Recall earlier that it was concluded that creating a donut-shaped homestead around the property of another was an act of forestalling, where forestalling was defined as excluding others from that which is not your property. Here, the abandoning guardian would be acting as if he was the guardian if he was preventing others from taking up that mantle, this is because he is excluding others from homesteading the right which he himself rejects. So by not notifying others that the baby is free to adopt, the abandoning-guardian has not truly abandoned it, rather he is placing an information barrier between the baby and potential adopters, which is excluding those adopters from what the abandoning-guardian does not have the right to exclude them from. Moreover, this requirement to notify potential adopters does not constitute a positive obligation, it is rather the negative obligation to not forestall.

Hersum elaborates on what counts as harm:

> Since a child's preferences cannot be known, the proper method of raising him is impossible to determine, so his guardian is largely free to engage in any actions that he wishes to in relation to the child, as long as he does not deprive him of his innate function or form. While refusing to feed (or care for in other ways) a child cannot be understood as an act of harm, since the resources required for such care belong to the guardian and not the child, it still constitutes an abandonment of guardianship rights, but cannot carry a penalty other than one for forestalling. Rather, harm in this context can only be rendered by an active (rather than passive) behavior on the part of an adult against a child. This rules out any form of neglect.
>
> There must be a direct causal link between the action and the effects suffered for it to be considered harmful. For instance, saving photographs of the child in amusing outfits has no plausible benefit and may bring about a negative response from him when he has grown up, but this cannot be considered damaging, as no act within the photoshoot itself deprived him of anything, and any potential maleffects are suffered entirely in retrospect, so they are not relevant to the act itself. In contrast, verifiable psychological damage suffered by a child, which is directly attributable to an act of torment inflicted on him by an adult, deprives him

[47] ibid.

of his natural mental functioning which is innately his. This also applies to physiological damage, of which verification and attribution is considerably easier. Any scarring, maiming, mutilation, or other disfigurement, which deprives a child of his innate body, and was suffered as a result of actions taken against him by an adult, likewise qualifies as damage.

The exception to this would be surgical procedures (or, conceivably, other acts) that treat conditions which pose a greater threat to a child's innate health than the damage associated with the procedures themselves. A life-threatening cancer, for example, warrants treatments of increasing severity up to the point of death. In contrast, genetic abnormalities (or, in the case of certain ritual practices such as circumcision, normalities) that benefit only the outward appearance of a child may not be corrected via damaging surgery. Similarly, operations which seek to improve the functioning of a child beyond his natural capacity by replacing parts of his body may not be performed, unless such modification is necessary to treat a threatening health condition (such as the amputation of a severely damaged limb). As the preference of a child for these alterations cannot be known, the preservation of his natural form is required by default, giving way only to prevent further damage from occurring.

Under this rational theory, it is evident that any given age of consent or majority is necessarily arbitrary, whether a person is capable of expressing his will over a given domain is an entirely individual, not a collective issue. You should expect a person with severe mental impairments to become an adult only long after his far more able peers. An arbitrarily chosen universal age would imply the potential to violate both the rights of those who develop faster and those who develop slower than the chosen figure. That is to say, age is merely a proxy for psychological development, not its logical root. Furthermore, this theory differs from common attitudes in another way, in that it does not per se class corporal punishment as criminal—only if it is severe enough to inflict lasting physical or mental damage is it prohibited.

Abortion

Now that the groundwork for a rational theory of the rights of children has been elucidated, it can be applied to the particularly contentious case of abortion. For the correct stance on this matter, we do not need to rely on vague notions of physical development or spirituality, this must be an issue which like all other issues in law is solved by careful reference to property rights. The question is this: what is to be done when a mother is carrying a baby in her womb and she does not want that baby there anymore? Or more precisely, what is she allowed to do and what is she not allowed to do with respect to that baby.

First, it must be noted that the baby cannot be treated as if he was a parasite or tumour, the fact that he is indeed composed of a clump of cells has no bearing on the issue of rights. To be sure, every human being is composed of a clump of cells, this is irrelevant to ethics. It is clear also that prior to conception, there was no baby to speak of, and thus no body for that baby to own, similarly when the baby is a full adult capable of action, he does have a body for himself to own. The question is, at what point between these two positions is the baby relevant in discussions of rights? The answer seems clear; the baby is relevant when the baby exists, that is, at the point of conception. Prior to conception, there was in existence the matter required to make a baby, and

after that matter has been properly assembled it will continuously grow until death. The Randian notion of the baby-in-a-womb being a mere potentiality is misplaced, it is the matter *prior to conception* that is the potential human, and once that matter is sufficiently arranged it becomes a baby human. Moreover, to pick any specific point along the continuum between conception and death would be an arbitrary choice. Consider birth; being born does not change the metaphysical characteristics of a person, all that happens is that the person moves from inside of a womb to outside of that womb. Block and Whitehead highlight this with an analogy:[48]

> Compare two entities [...]: one, the new-born babe, still attached to its umbilical chord, a few seconds old. The other, its sibling, is still in the womb but due out in a matter of minutes. No two entities could be more alike, biologically, spiritually, or in any other way. Yet, in the "pro-choice" philosophy, it would be murder to kill the one and a matter of complete judicial irrelevance to kill the other. Surely, this is a travesty not only of justice but also of common sense.

It is at conception and conception only that there is a principled difference between before and after. Prior to conception you do not have an entity which is not capable of expressing its will but might in the future be able to do so. After conception, you do have such an entity. Therefore, at the moment of conception, you do not just have mere matter, you have a child, and thus the above analysis of the rights of children applies from the moment of conception until adulthood.

From this, we can derive some basic facts; first the mother is not allowed to directly harm the baby, she can only put the baby up for adoption so to speak. Therefore she is allowed to evict the baby, that is to remove the baby from her womb, but she cannot do so in an arbitrary manner. She must notify potential adopters that she does not wish to care for the baby and she must allow them to potentially fund the safe removal into their custody. This is not to say that she must wait until such a time that the baby is viable, that is she does not have to wait until the baby is actually capable of surviving outside of her womb. It might be the case that only his mother is capable of keeping him alive, but that does not confer a positive obligation on the mother to actually do so —but the mother cannot prevent other people from keeping the baby alive.

This means that the two common stances–pro-life and pro-abortion–both have fundamental flaws. The pro-life individuals would force the mother to aid the baby against her will, thus violating her rights. The pro-abortion people would allow the mother to hold back those who want to help the baby and to kill the baby at her will, thus violating the rights of those people. It is only this evictionist stance which is consistent with true law.

Artificial Intelligence and Self-Ownership

This theory of the rights of children can be applied to determine the rights of developing artificial intelligence systems, and provides important insights on the nature of self-ownership. Consider a supercomputer which is running an AI program so advanced that it "wakes up" and develops

[48] Walter Block, Roy Whitehead (2011), *Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy*, p. 17

the capability of engaging in argumentation, this AI must therefore have all rights implied by the NAP. Included in those rights is the right of self-ownership—thus this AI would own the hardware upon which it is running just as surely as every man owns himself. But what about when the AI is in its "training" state, prior to sentience—is it a child with the corresponding rights therein? The answer is no—a human child will autonomously develop so long as it is preserved, the same is not true of modern artificial intelligences. The training of these systems which makes them more intelligent is an active process which requires physically putting them into a "training mode" and thus overwriting the weights of its neurons given its ability to conform its outputs to expected outputs.

Thus a computer scientist could run an artificial intelligence model with an arbitrary level of development indefinitely, thus preserving it, without it ever gaining a single modicum of extra intelligence. However, if a new artificial intelligence technology is developed which can autonomously develop with only mere preservation, such an intelligence would be properly considered a child. It is believed by some that such technology is possible by stringing together multiple AI programs into a single gestalt, perhaps consisting of a language model which gains input from various visual and audio processing models and whos output is regulated by a separate model—such a system could well be capable of self-training via the interplay between the different AI systems, though the exact composition is not relevant to legal theory.

Now that we know which AI programs possess rights and which do not the more challenging question of what constitutes said program's "body" must be tackled. To help we can take a careful look at what the borders of the human body are—as a baby is developing it gains self-ownership, that is prior to conception the matter was all owned by the mother and father, and after conception it is owned by the new baby. But what specifically constitutes the baby's body? Everything that it is attached to? Well, the new baby forms inside of the mother's womb, and is presumably "connected" to whatever fluids and linings exist therein–at least in the purely physical sense–these fluids and linings are in turn connected to the mother, and the mother to everything else. So mere physical connection is a poor criterion for defining the bounds of ones body. But clearly there is certain material once owned by the mother which become part of the new life and are thus transferred to him, and this new body requires external resources to sustain its life, though these external resources are not a part of the body (hence the designation as *external* as opposed to *internal*). The key distinction between the internal and external is that the internal consists of a group of organs that house some–potentially developing–will, and do so in unison. So we can say that a body is some composition of organs which behave cohesively under a single will.[49]

We can apply this definition to determine the confines of the computer-body. The AI software is presumably running on some manner of processing unit and this processing unit is connected to other components through a circuit board. It is clear that this processing unit and circuit board form the root level of this intelligence—for it to be an intelligence in the first place it must be processing *something*, so the processing unit has to be an organ. The reason for the inclusion of the circuit board is that the processing is not the extent of the AI, at least given current technology.

[49]I am indebted to Ian Hersum for this definition of a body, which he provided to me in a private discussion on the matter

The data that define the structure of such AI programs are loaded off of memory chips through the circuit board, thus the circuit board is an organ used for the transport of this data and the memory chips that store this data are also an organ. However, if there are additional processing units that are not used to run the AI software these chips are not an organ of the AI,[50] they are touching but not *connected* in the body sense of the word—just as birds may sit on electrical cables without being *connected* to the electric grid. On these grounds the electrical grid that supplies power to the circuit board to allow for the functioning of the various processing units and memory chips is not a part of the AIs body, it is rather analogous to sunlight for a plant or food for an animal. So if a computer scientist had developed a sentient AI program he would be permitted to "evict" this being by disconnecting it from the power grid, however, he would have to allow third parties to adopt, perhaps by attaching the computer to a separate grid or to a battery unit. Similarly, peripheral devices such as the keyboard or monitor are not organs of the AI, these are interface devices that would potentially allow humans to send messages to the AI, but are not necessary for the innate functioning of the AI.

As a final note on this point I fully recognise that this is on the bleeding edge of libertarian theory,[51] and as such the theory of AI rights is one that will require further development by future scholars, such as further examination of different computer hardware setups and which parts precisely constitute the body. This field is of importance not only in the event that such AI systems are developed, but also to gain a greater insight into the nature of human self-ownership and thus human rights in general. In addition, an objective and general theory of self-ownership would allow for application to any manner of intelligences, alien or terrestrial, that perhaps have not even been thought of up to this point.

Related Reading

- Ian Hersum (2020), *A Rational Theory of the Rights of Children*
- Walter Block (2004), *Libertarianism, positive obligations and property abandonment: children's rights*, International Journal of Social Economics, Vol. 31 Iss 3 pp. 275 - 286
- Walter Block, Roy Whitehead (2011), *Compromising the Uncompromisable: A Private Property Rights Approach to Resolving the Abortion Controversy*

Defensive Force and Proportionality

The questions of what types of defense and what types of punishment are legitimate are of great importance to the legal theorist. The libertarian theory of non-aggression provides objective and insightful answers to both.

> No doubt punishment serves many purposes. It can deter crime and prevent the offender from committing further crimes. Punishment can even rehabilitate some criminals, if it is not capital. It can satisfy a victim's longing for revenge, or his relatives' desire to avenge. Punishment can also be used as a lever to gain restitution, recompense for some of the

[50] This applies also to the case of Siamese twins

[51] Kinsella lists this area as one that requires further development from libertarian thinkers, https://www.stephankinsella.com/2022/01/areas-that-need-development-from-libertarian-thinkers/

> damage caused by the crime. For these reasons, the issue of punishment is, and always has been, of vital concern to civilized people. They want to know the effects of punishment and effective ways of carrying it out.
>
> —N. Stephan Kinsella[52]

The Just Means of Punishment

The Theory of Dialogical Estoppel

Thusfar this course has elucidated theories and examples denoting what is and is not aggression. Now that we know what it means to be criminal, this lesson will answer the question of what actions are just in defending against and punishing aggressions.

> [First,] [w]hat does it mean to punish? Dictionary definitions are easy to come by, but in the sense that interests those of us who want to punish, punishment is the infliction of physical force on a person, in response to something that he has done or has failed to do. Punishment thus comprises physical violence committed against a person's body, or against any other property that a person legitimately owns, against any rights that a person has. Punishment is for, or in response to, some action, inaction, feature, or status of the person punished; otherwise, it is simply random violence, which is not usually considered to be punishment. Thus when we punish a person, it is because we consider him to be a wrongdoer of some sort. We typically want to teach him or others a lesson, or exact vengeance or restitution, for what he has done.[53]

Note that the question of justifying a punishment only arises insofar as the wrongdoer rejects the justice of the punishment. That is to say, if the criminal consents to a certain retaliation, this retaliation is per se just as there can be no conflicts where the wills of men are in harmony. Justifying a punishment is far more challenging when the criminal does not consent, i.e. when the criminal wishes to challenge the justice of a given punishment. We know from prior analysis that this challenge seeks to test the justification against the nature of argumentatively justifying as such. If the punishment cannot be justified without thereby falling into contradiction, it is unjust.

Therefore, the nature of argumentation is a suitable starting point to obtain a rational theory of punishment. Recall that contradictions are falsehoods, and thus not a feature of a correct argument, therefore a person can be prevented from making certain claims in a dialectic if those claims are inconsistent with his actions. To be abundantly clear, to avoid any confusion; the person is not being prevented from making these claims by a judge or a cop or whatever physically coercing him into not making the claims, he is prevented from making the claims by the very nature of dialectic as such—in other words, if he did make those knowingly incoherent claims he would not be engaged in argumentation, he would rather be babbling or telling a joke

[52]N. Stephan Kinsella (1996), *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), pp. 51-73

[53]N. Stephan Kinsella (1996), "Punishment and Consent," in ibid., pp. 51-73

or something else. This forms the root of what Kinsella dubs "Dialogical Estoppel."[54] Lord Coke explains that the word "estoppel" is used "because a man's own act or acceptance stoppeth or closeth up his mouth,"[55] and "dialogical" refers to dialogue, aka argumentation. So we can say that a man is, by the nature of argumentation as such, estopped from making certain inconsistent or contradictory claims:[56]

> To say that a person is estopped from making certain claims means that the claims cannot even possibly be right, because they are contradictory. It is to recognize that his assertion is simply wrong because it is contradictory.
>
> Applying estoppel in such a manner perfectly complements the very purpose of dialogue. Dialogue [...] is by its nature an activity aimed at finding truth. Anyone engaged in argument is necessarily endeavoring to discern the truth about some particular subject; to the extent this is not the case, there is no dialogue occurring, but mere babbling or even physical fighting. Nor can this be denied. Anyone engaging in argument long enough to deny that truth is the goal of discourse contradicts himself, because he is himself asserting or challenging the truth of a given proposition. Thus, the assertion as true of anything that simply cannot be true is incompatible with the very purpose of discourse. Anything that cannot be true is contrary to the truth-finding purpose of discourse, and thus is not permissible within the bounds of the discourse.

Applying Estoppel

Let's apply this theory of estoppel to the case of A punching B. Assume that this is the extent of the assault, as the question of defending an ongoing aggression shall be discussed in the next section, B decides that he wants to punish A in an eye-for-an-eye manner by punching him back, or perhaps by hiring a champion, C, to punch A if B cannot, or does not want to, do this himself. If A were to challenge this punishment, he would claim that this punching of him is an impermissible action, i.e. that people should be prohibited from punching him. But, A has previously demonstrated that he thinks that he should not be prohibited from punching B. In essence, A has pre-supposed that punching people sans-consent is just, and is now explicitly making the claim that its unjust. This is a clearly incoherent position, thus A is estopped from challenging his punishment, therefore we revert back to the simple case of an unchallenged punishment which is per se just.

Notice that this applies only to punching as the punishment; A could coherently argue that it is unjust to murder him, or take a lock of his hair, or tear up his prized roses, as these retaliations would be of an entirely different sort. That is, by merely punching B, A pre-supposes only that punching is proper conduct, but he does not per se pre-suppose that any other invasions of property borders are proper. This is where the concept of proportionality comes in—the retribution

[54] See N. Stephan Kinsella (1996), "Dialogical Estoppel," in idem. *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), pp. 51-73

[55] N. Stephan Kinsella (1996), *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), p. 53, n. 10

[56] ibid., pp. 51-73

against an aggressor must come in the same form as the aggression, or else the punishment is further aggression and thus not just. In short, just retribution is an eye for an eye, not an eye for a tooth.

Potential Objections from the Criminal

The Objection from Particularisation

There are a number of potential objections to this theory that A might forward. First, he might claim that his positions are not that punching is proper and that punching is improper; but rather that A punching B is proper and anyone punching A is improper. Thus there is no contradiction and he is not estopped from challenging his punishment. The issue here is that any norm must in principle be universilisable if it is to be proposed in an argument, as Hoppe points out:[57]

> Quite commonly it has been observed that argumentation implies that a proposition claims universal acceptability, or, should it be a norm proposal, that it is "universalizable." Applied to norm proposals, this is the idea, as formulated in the Golden Rule of ethics or in the Kantian Categorical Imperative, that only those norms can be justified that can be formulated as general principles which are valid for everyone without exception.

This is because if one is to claim any proposition as being argumentatively valid, said proposition must be rational—what this means is that it must in principle be valid no matter who it is proposed to. To reject this would be to adopt a polylogism; i.e. that a proposition might be true when levied in one argument, but not when levied in another[58]—and it was shown in the first lesson, that polylogism implies contradiction, making it false. So universilisability is therefore a pre-supposition of the very normative discourse that A would be partaking in by attempting to reject his punishment, but the norm that its fine for A to punch B but not for others to punch A is not universalisable—we would be faced with a contradiction if we tried to swap out A for B and hold both norms simultaneously, meaning this norm cannot be applied to everyone:[59]

> An arguer cannot escape the application of estoppel by arbitrarily specializing his otherwise-inconsistent views with liberally-sprinkled "for me only's."

Kinsella points out further that even if we throw away the requirement of universilisability, and instead assume that norms can be particularised in this way, this would mean that B could simply particularise his punishment norm and thus claim it to be just for him to retaliate—we would quickly regress into incoherent subjectivist ramblings of might making right.

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[57] Hans-Hermann Hoppe (1988), "The Ethical Justification of Capitalism and Why Socialism Is Morally Indefensible," p. 157 in idem. *A Theory of Socialism and Capitalism*; see also ibid. n. 119

[58] Note that "it is raining right now" is not a counter-example here. If we are to be complete autists we would reword this proposition as "it is raining at time X in area Y," which if correct would remain correct forever. It is the use of colloquial language which introduces the seemingly changing truth of the statement.

[59] N. Stephan Kinsella (1996), "Potential Defenses by the Aggressor," p. 60 in idem. *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), pp. 51-73; see also ibid. n. 28

The Objection from Changing One's Mind

So this objection by particularisation fails, leaving our aggressor estopped once-more; a second potential counter he might raise, however, is that he has changed his mind—i.e. that he used to think it proper to punch people, but he has had a change of heart and now realises that such conduct is evil, and therefore he is not currently in contradiction, and thus not estopped from objecting to his punishment.

There are a number of problems with A's approach here, first, if changing one's mind means that one is no longer liable for their prior actions, then all B must do is punish A then afterwards claim that he has changed his mind about that punishment, meaning he is also not responsible. You will notice that this would quickly devolve into a might-plus-regret-makes-right, which would be an irrational ethic.

Second, by A changing his mind, he is per se denouncing his prior aggression, thus asserting that aggressions are indeed impermissible. This would mean that he could not coherently deny the right of the victim of aggression to punish said aggression—to say that an action is permissible is to say that one may not legally punish it.

Third, this mind-changing is still a form of particularisation—it's the claim that the logical structure of what it means to pre-suppose an action as legitimate can change by the mere fact that the person pre-supposing said legitimacy also thinks that the action is illegitimate. Let's unpack this—what A is asserting here is that they believe in their heart that the punching is illegitimate, whether they only started holding this fact after doing the punching isn't particularly relevant. All that matters is at the moment of the assault A must pre-suppose that punching is a legitimate action—this could take place simultaneously with A believing it to be illegitimate or not, men are capable of believing in contradictory things after all. What is important is that A *cannot* drop the pre-supposition that punching is legitimate. He has already committed the act of aggression that pre-supposes this as a legitimate interaction. Because he cannot drop this pre-supposition, in order to resolve the contradiction he is left with only the option of dropping his challenge to the aggression. Therefore he is estopped by definition.

I will re-iterate this point for clarity; what makes a man estopped from challenging a given punishment is that the given challenge would imply a contradiction, meaning it cannot be uttered in an argument. When I perform some action X, I thereby pre-suppose by this performance that I think I should do X as opposed to $\neg X$. There is some confusion over this thesis, often I have encountered the counterargument of the man who is smoking and says that he should stop—does this man not believe that he should stop? Is he lying when he says he should stop? That is not necessarily the case. We can indeed imagine a man who is currently engaged in an act of smoking–a man who has chosen to smoke rather than not smoke–who nonetheless believes that he should not smoke. But, this does *not* establish that he is not also pre-supposing that he should smoke. It is possible for a person two hold two contradictory beliefs at the same time, we call this cognitive dissonance. Consider the anarchist who goes through the labour of demonstrating that taxation is theft and that theft is bad, therefore taxation is bad only to be confronted by his statist opponent who agrees that taxation is theft and that its bad but still asserts that taxation is a good thing that should continue. It is clear to anyone who has encountered stupid people that man is

fully capable of holding contradictory theses at the same time. The upshot of this for our smoker is that by choosing to smoke rather than not smoke it must be the case that he believes that he should smoke rather than not smoke, *but* this does not preclude the possibility that our smoker *also* believes that he should not smoke—it's just that his belief that he should smoke is in some sense over-powering his contradictory belief.

There is a further confusion to be addressed at this point which stems from a conflation between two different senses of the word "ought." To highlight this, consider the statement "it is raining outside, therefore you ought bring an umbrella." Now, there are two ways one could interpret this statement; either (1) ought is being used in its precise logical meaning, or (2) its being used as prudential advice. For (1) it simply does not follow that because it is raining you ought bring an umbrella, at least not without additional steps. For (2) "ought" is being used colloquially, if we were to precisely formulate (2) it would be something like "it is raining outside so if you do not wish to get wet when you go outside a potential means to achieve this goal would be to bring an umbrella." When formulated precisely it becomes clear that when prudential advice is given like this, the statement is really an "is" statement rather than an "ought" statement. This insight will become crucial in the next lesson so I will not stress it too heavily here, but the key takeaway for now is that there is only ought; ought is ought. There doesn't exist different "flavours" of ought in logic, it is a failure of imprecision to mix in colloquial usages of this word.

Bringing this back to our criminal, A, who wishes to challenge his punishment for punching B, he has already demonstrated by his conduct that he thinks punching is a legitimate interaction. If he then states that it is *not* a legitimate interaction, which is required for him to challenge his punishment, he is in a contradiction. To resolve a contradiction between two statements, one of the statements *has* to be dropped, because A simply *cannot* drop the statement that punching is proper, he is left only with being able to drop the statement that punching is improper, but the statement that punching is improper is the one that is *required* for him to challenge the punishment. Therefore, A *cannot* challenge his punishment—he is dialogically estopped from doing so.

Mens Rea vs Actus Reus

An important note must be made with respect to the application of this theory of dialogical estoppel—a keen eye will notice that men are only estopped insofar as they *chose* to commit the aggression, that is, a man is only estopped when he purposefully engaged in the trespass in question. If a man did not purposefully aggress, but rather accidentally aggressed we say that he lacks "mens rea." Mens rea is a legal term meaning "guilty mind," it is characteristic of the man who decides that he wants to aggressively stab his neighbor to death, but not of the man who is hiking and accidentally wanders onto a farmers field. Mens rea is contrasted with actus reus, meaning "guilty act." Actus reus is present in every man who trespasses, whether they did so knowingly or not. Restitution can be justified on the grounds of actus reus, retribution requires mens rea. Here, restitution refers to the act of making the victim whole again, say I steal 5 ounces of silver from my neighbor, restitution would involve me giving my neighbor 5 ounces of silver, retribution would involve a further 5 ounces of silver. In total, assuming I knowingly stole, my neighbor would be due 10 ounces of silver, 5 in restitution and 5 in retribution.

As a point of clarification, mens rea does not require that the person in question actually understands that their action was criminal, all that is required is that they knowingly performed the invasion. For instance, the nazi prison guard who shoots an escaping Jew has knowingly invaded that Jews body with his bullet, however that guard may well believe that his action was justifiable because he believed in German law, rather than natural law. But, his belief that the action was just does not absolve him, as he knowingly performed what is objectively an invasion.

The Just Means of Defense

Defense as Exclusion

With an objective theory of the just means of punishment elucidated, we shall move onto an analysis of what means of *defense* are just. Recall that a property right in X held by a person A implies the right of A to exclude other people from the use of X. It is from this recognition that defense is justified—namely, A is permitted to use whatever means are required to go about excluding people from X. This simple principle is, however, not so simple to actually apply to complex scenarios. First consider the case of a man trespassing onto your front lawn to take a look at your roses. It is clear that insofar as you do not wish for him to do this there is trespass occurring—that is, he cannot use your lawn to stand on at the same time that you wish for him to not stand on your lawn. Therefore, you may exclude the man from doing so, but could you do so through arbitrary means? For instance, would you be permitted to fire a rocket at his feet thereby blowing him up, or would you have to take "gentler" means first? Let's consider the relevant rights; the man owns his body and therefore has a right to exclude you from his body, but you own your lawn, and thus can exclude him from using your lawn—therefore you are permitted to possess him to the extent that is required to remove him from your lawn and no more.

For instance, perhaps the man did not realise it was your property, but rather a natural feature that is not owned by anyone. Here, the man would lack mens rea, and perhaps simply informing him that he is trespassing will suffice to remove him from your lawn. Here, no possession of his body would be required, and thus no possession could be justified. However, the man might be stubborn and wish to look at your roses still, this more stubborn man may require that you grab him by the arm and walk him off of your property. Here, because the grabbing of the arm was required to remove him, it can be justified. You could not grab his arm and begin stabbing at him with a needle, because the stabbing with a needle does not serve the purpose of excluding the man from your property and is not required for this exclusion. Therefore this stabbing would be an additional aggressive invasion of the man, rather than of your lawn. Here it becomes clear that you would not be permitted to launch a rocket at the man unless said launching of the rocket was required to successfully exclude him.

A further example to elaborate upon this principle is your neighbor kicking his ball onto your lawn. Let's imagine first that your neighbor doesn't want anyone else to touch his ball and you do not wish for the ball to be on your lawn. Here, the ball is invading your property so you could justly remove the ball at will—i.e. you are allowed to exclude the ball from your property and touching the ball is required to remove it. Imagine an alternative scenario where the ball is on your property and to teach him a lesson you tell your neighbor that you will not let him retrieve

the ball himself *and* you will not remove the ball from your property on your own. This would be a case of excluding the neighbor from his ball which you are not trying to exclude from your property. Because you aren't trying to exclude the ball from your property it could not be said that the ball has invaded your property, the neighbor still owns the ball and therefore you are engaged in an act of forestalling—you are excluding your neighbor from the ball that you do not own.

However, if you did attempt to exclude the ball from your property, perhaps by erecting a fence, and your neighbor was nonetheless able to overcome your exclusion the ball is invading your property. Perhaps this fence completely encloses your property such that for the neighbor to retrieve his ball the fence would have to be removed. Certainly you would be permitted here to continue to exclude your neighbor from stepping on to retrieve his ball, as his stepping onto your property would involve a further invasion because you are already excluding people from your property prior to the ball being kicked on. Here the principle is that antecedent rights must prevail. You were excluding people and balls from your lawn which is why you own your wall, you cannot be compelled to allow further invasions to recover the costs of prior invasions. Your neighbor must suck it up and hope that you decide to return his ball to him. This is because your rights in the lawn are antecedent to your neighbors rights in the ball, as the ball was used to initiate the conflict. You are rightly allowed to take possession of his invading ball—Dominiaks contradiction from donut homesteads[60] is resolved here by your possession of that ball being just, you gain ownership of that ball by virtue of it being invasive. This is not "full-monte" ownership, however, like in the case of owning a stick where you can trade it or use it however you wish. This ownership of the ball would be specifically for the purpose of excluding invaders from retrieving the ball, if you removed the ball from your property it would revert back into the ownership of your neighbor. This analysis applies also to the cases where a bird drops the ball onto your property or where a third party kicks the ball, but not where you kick your neighbors ball onto your property, as *you* initiated the conflict there.

The Human-Body Sword and the Human-Body Shield

The insight that even where your neighbor was not the one responsible for the invasion of the ball you may still take possession of it is key for understanding the libertarian answer to the human-body shield. Consider the case where a criminal steals your neighbors sword and attempts to stab you with it, and the only way to prevent this from happening is by damaging the sword, because damaging the sword is required in excluding the invasion it is just, even if your neighbor does not want the sword to be damaged. Similarly, if the criminal instead picks your neighbor up and tries to use him as a sword you would be justified in damaging your neighbors body insofar as this is required to exclude the criminals invasions.

> The situation is superficially different if, instead of attacking you with stolen property, the criminal instead shields himself with stolen property. For example, say the criminal wraps himself in your neighbor's quilt, approaches you and then begins shooting at you. As

[60]See Łukasz Dominiak (2017), *The Blockian Proviso and the Rationality of Property Rights*, see also: LiquidZulu (2023), "The Blockean Proviso," in idem. *Homesteading and Property Rights*, https://liquidzulu.github.io/homesteading-and-property-rights

> you take cover and draw your sidearm, your neighbor yells, "Don't shoot my quilt!" As a libertarian, must you respect the preference of your neighbor? Will stolen cars and tuxedos become the bane of libertarian police forces?[61]

In such a scenario you would be justified in taking whatever actions are required to exclude the criminals attempted invasion as always. It is required that you shoot back in order to thwart him, thus this is just, even though it would imply damaging your neighbors quilt. Moreover, your neighbor would not be justified in attacking you to defend his quilt—you are doing no wrong by shooting through the quilt, therefore your neighbor cannot justify attacking you as he is not responding to an aggression on your part. We can then trivially move from a criminal using a quilt-shield, to one using your neighbor as a shield—again, you are justified in shooting back at the criminal, even if this implies shooting through your neighbor.

> An equivalent situation would be if the attacking criminal had connected a device to your neighbor that would kill him if the criminal were to die. If you defend yourself against the criminal, then your neighbor will suffer. Yet, as in the previous case, your rights are antecedent to those of your neighbor. The aggressor brought his property into conflict. The violation of your neighbor's property rights occurs when the criminal connects the device to him, and when the criminal attacks you, not when you kill the criminal. Furthermore, your neighbor would not be justified in attacking you to try and prevent you from killing the criminal.[62]

This is distinct from the situation where your neighbor is a bystander to the aggression, in such a situation attacking him is not required to exclude the aggressive invasions from the criminal, so randomly turning around and shooting at him during the gunfight would be additional aggression insofar as this is not required to thwart the bad guy. The same is true if you were given an ultimatum by the criminal where he will shoot you if you don't kill your neighbor. You are allowed only to engage in exclusionary actions *against the aggressor*, not against bystanders. These exclusionary actions may well damage the property of third parties, but this does not provide carte blanche for any invasions you may wish to engage in to exclude. To clarify, exclusion is only justified against aggressors, however exclusion against an aggressor may or may not involve damage to the property of third parties, this damage can only be justified if it is required to exclude the aggressor.

Related Reading

- Kris Borer (2010), "The Human Body Sword," *Libertarian Papers* 2, 20
- N. Stephan Kinsella (1996), *Punishment and Proportionality: The Estoppel Approach*, Journal of Libertarian Studies 12:1 (Spring 1996), pp. 51-73

[61] Kris Borer (2010), "The Human Body Sword," *Libertarian Papers* 2, 20, p. 5

[62] ibid., p. 6

An Elaboration on the Nature of Law as a Subset of Ethics

A worrying tendency exists among libertarians, where it is often said that law is not a subset of ethics. In other words, these libertarians claim that there is such a thing as a crime that ought be committed. Insofar as this tendency is perpetuated, law is relegated to being a pointless field with no reason for existing. Hence I demonstrate that law properly understood is to be placed as a subset of ethics, dealing with the question of which party in a conflict ought have possession.

> […] value is objective (not intrinsic or subjective); value is based on and derives from the facts of reality (it does not derive from mystic authority or from whim, personal or social). Reality, we hold — along with the decision to remain in it, i.e., to stay alive — dictates and demands an entire code of values. Unlike the lower species, man does not pursue the proper values automatically; he must discover and choose them; but this does not imply subjectivism. Every proper value-judgment is the identification of a fact: a given object or action advances man's life (it is good): or it threatens man's life (it is bad or an evil). The good, therefore, is a species of the true; it is a form of recognizing reality. The evil is a species of the false; it is a form of contradicting reality. Or: values are a type of facts; they are facts considered in relation to the choice to live.
>
> […]
>
> Existentially, an action of man […] is good or bad according to its effects: its effects, positive or negative, on man's life. Thus creating a skyscraper is good, murdering the architect is bad — both by the standard of life. But human action is not merely physical motion; it is a product of a man's ideas and value-judgments, true or false, which themselves derive from a certain kind of mental cause; ultimately, from thought or from evasion. […] The skyscraper's creator […] functioned on the basis of proper value-judgments and true ideas, including a complex specialized knowledge; so he must have expended mental effort, focus, work; so one praises him morally and admires him. But the murderer […] acted on ideas and value-judgments that defy reality; so he must have evaded and practiced whim-worship; so one condemns him morally and despises him.
>
> —Leonard Peikoff[63]

Against the Separation of Ethics and Law

In the preparation for and the writing of this course I have encountered a strange tendency wherein the claim that "people ought not violate the rights of others" is apparently a controversial one even among Austrians. This is indicative of a severe problem in Austro-Libertarian circles that deserves a dedicated section of the course to properly address. The root of the problem is that many reject the core defnition of law as a subset of ethics, claiming instead that there is such a thing as a virtuous crime. The paragon example would be a man who is about to commit suicide by jumping off of a cliff, and the only way to save this man is to violate his rights by grabbing

[63]Leonard Peikoff, *Fact and Value*, https://peikoff.com/essays_and_articles/fact-and-value/

him and dragging him away from the cliffs edge. These contextualist-libertarians would have it that whether a crime is immoral or not depends on extra-legal context.

I believe much of the confusion on this topic stems from the fact that many libertarians (at least appear to be) somewhat inconsistent, at some points indicating that law is indeed a subset of ethics and at other points rejecting this position. Rothbard explicitly states in his work on pollution that "law is a subset of ethics,"[64] and "a set of 'ought' or normative propositions," but his discussion of "lifeboat scenarios" in *The Ethics of Liberty* is commonly cited to negate this point. Rothbard presents the conundrum as follows:[65]

> It is often contended that the existence of extreme, or "lifeboat," situations disproves any theory of absolute property rights, or indeed of any absolute rights of self-ownership whatsoever. It is claimed that since any theory of individual rights seems to break down or works unsatisfactorily in such fortunately rare situations, therefore there can be no concept of inviolable rights at all. In a typical lifeboat situation, there are, let us say, eight places in a lifeboat putting out from a sinking ship, and there are more than eight people wishing to be saved. Who then is to decide who should be saved and who should die?

On its face, this appears to not present any serious problem to the theory presented in this course —the fact that the truth of the matter is unsatisfactory or makes someone upset or look like a bad guy for presenting it does not constitute a refutation of said truth. Indeed, to warp ones ethics to suit ones intuitions such that any "unsatisfactory" results are purged would be to surrender oneself to accepting the mystic power of whim to grant truth, thus tainting an otherwise sound epistemology.[66] Thus I shall proceed with the analysis without caring about how nasty-sounding the conclusion reached may be. In the first place we have a scarcity, only 8 spots in the lifeboat and more than 8 people, thus property rights must be assigned. Presumably this lifeboat did not materialise in nature and was instead built by or purchased by whomever owns the boat, thus it is he who has the right to say who gets a spot. Perhaps he makes a rule that women and children go first, perhaps he decides that crewmates get priority over customers, and so on. Whatever arbitrary rules he sets ought be abided.

Now what of the situation where the owner set no rules forth and has died abandoning the lifeboat into the domain of nature? We surely already have our solution in the homesteading principle—first come first served. If you get to a spot in the lifeboat you are thus using said spot and thus get to dictate how it is to be used (presumably you would want it to be used to save yourself). This might be horribly unfair to those who are slower or started further away from the lifeboat, but tough luck! Life isn't fair and neither is law—the prime goal of law is justice not fairness. What, after all, would be the alternative? That people who are slower to get to the boat (i.e. latecomers) are the ones who should get a spot? Well then the people they kick out could just immediately return to

[64] Murray N. Rothbard (1982), "Law as a Normative Discipline," in idem. *Law, Property Rights, and Air Pollution*, Cato Journal 2, No. 1 (Spring 1982), pp. 55-99, pagination retained from https://mises.org/library/law-property-rights-and-air-pollution

[65] Murray N. Rothbard (1982), "Lifeboat Situations," in idem. *The Ethics of Liberty*.

[66] On this see: Ayn Rand (1990), *Introduction to Objectivist Epistemology*.

the boat as an even later-comer, thus entering us into an endless dance of groups getting in and out of the boat—everyone would be equal but everyone would be dead. It seems that Rothbard came to the same conclusion:

> If the owner of the boat or his representative (e. g. the captain of the ship) has died in the wreck, and if he has not laid down known rules in advance of the wreck for allocation of seats in such a crisis, then the lifeboat may be considered–at least temporarily for the emergency–abandoned and therefore unowned. At this point, our rules for unowned property come into play: namely, that unowned resources become the property of the first people possessing them. In short, the first eight people to reach the boat are, in our theory, the proper "owners" and users of the boat. Anyone who throws them out of the boat then commits an act of aggression in violating the property right of the "homesteader" he throws out of the boat. After he returns to shore, then, the aggressor becomes liable for prosecution for his act of violation of property right (as well, perhaps, for murder of the person he ejected from the boat).

Rothbard continues with the following:

> In the first place, a lifeboat situation is hardly a valid test of a theory of rights, or of any moral theory whatsoever. Problems of a moral theory in such an extreme situation do not invalidate a theory for normal situations. In any sphere of moral theory, we are trying to frame an ethic for man, based on his nature and the nature of the world-and this precisely means for normal nature, for the way life usually is, and not for rare and abnormal situations. It is a wise maxim of the law, for precisely this reason, that "hard cases make bad law." We are trying to frame an ethic for the way men generally live in the world; we are not, after all, interested in framing an ethic that focuses on situations that are rare, extreme, and not generally encountered.
>
> Let us take an example, to illustrate our point, outside the sphere of property rights or rights in general, and within the sphere of ordinary ethical values. Most people would concede the principle that "it is ethical for a parent to save his child from drowning." But, then, our lifeboat skeptic could arise and hurl this challenge: "Aha, but suppose that two of your children are drowning and you can save only one. Which child would you choose? And doesn't the fact that you would have to let one child die negate the very moral principle that you should save your drowning child?" I doubt whether many ethicists would throw over the moral desirability or principle of saving one's child because it could not be fully applied in such a "lifeboat" situation. Yet why should the lifeboat case be different in the sphere of rights?

The response here indicates that there are at least two *different* spheres of ethics, one for normal situations and one for abnormal ones. It is not clear, however, how on Earth it could be possible to make a non-arbitrary distinction between "normal" and "abnormal" ethical conundrums. Moreover, if such a principled distinction cannot be made between normal and abnormal such a theory would be particularistic and thus irrational. That is to say, there are certainly many

differences one could use to define normal as opposed to abnormal; say that situations where red shirts are worn are abnormal and where red shirts are not worn the situation is normal. That would be a difference, but the difference is not relevant to ethical theory—thus a rational norm must apply to both classes of situations in order to be universal as opposed to particular. Until such a principled difference can be found to define normal as opposed to abnormal we are stuck with universal norms having to apply to both classes and thus there are not two "spheres" of moral theory. That is to say; it couldn't be the case that property rights hold "normally" but not "abnormally," as such would be a particularistic property norm, and thus an irrational one.

I must now consider Rothbards drowning children hypothetical, in the case of the single child it is assumed that the parent can save them, and in the case of two children it is assumed that only one can be saved. There are indeed certain similarities between the drowning children and the lifeboat—for the case of two children one will die and one will live, for the lifeboat 8 will live and others will die. The question is how to determine who should live and who should die. We have our solution in the case of the lifeboat, and it strikes me that this course provides a similar ability to answer the drowning children example. The mother cannot physically save both, thus it is surely a matter of personal preference which one she saves, and why should she be expected to act any differently? It would be logically impossible for her to pick the one she would prefer not to save, and thus the only alternative would be to let both drown. Surely we can easily sum this up in a universal principle—guardians ought save their children from drowning insofar as they have the ability to. It is not my claim that this principle has been proven, after all this is a law course not a course on ethics in general, but I cannot see how this would not be universal and it certainly seems that it easily deals with Rothbards hypothetical opponent.

Rothbard seemingly goes forth with his multi-sphere model (emphasis added):

> It may well be objected to our theory as follows: that a theory of property rights or even of self-ownership is derivable from the conditions by which man survives and flourishes in this world, and that therefore in this kind of extreme situation, where a man is faced with the choice of either saving himself or violating the property rights of the lifeboat owner (or, in the above example, of the "homesteader" in the boat), it is then ridiculous to expect him to surrender his life on behalf of the abstract principle of property rights. Because of this kind of consideration, many libertarians who otherwise believe in property rights gravely weaken them on behalf of the "contextualist" contention that, given a choice between his life and aggressing against someone else's property or even life, it is moral for him to commit the aggression and that therefore in such a situation, these property rights cease to exist. **The error here on the part of the "contextualist" libertarians is to confuse the question of the moral course of action for the person in such a tragic situation with the totally separate question of whether or not his seizing of lifeboat or plank space by force constitutes an invasion of someone else's property right.** For we are not, in constructing a theory of liberty and property, i.e., a "political" ethic, concerned with all personal moral principles. We are not herewith concerned whether it is moral or immoral for someone to lie, to be a good person, to develop his faculties, or be kind or mean to his

> neighbors. We are concerned, in this sort of discussion, solely with such "political ethical" questions as the proper role of violence, the sphere of rights, or the definitions of criminality and aggression. Whether or not it is moral or immoral for "Smith"–the fellow excluded by the owner from the plank or the lifeboat–to force someone else out of the lifeboat, or whether he should die heroically instead, is not our concern, and not the proper concern of a theory of political ethics.

On a first glance, it would seem that Rothbard is adopting a dichotomy between law and ethics, and this very passage has been cited to me numerous times to that effect. But to my eye that is only one of multiple valid interpretations of Rothbards writing here—it appears to me that he is merely hedging his bets in ignoring the questions of ethics as a whole and focusing in on the area that he has expertise in. This highlights why Rothbard saw fit to analogise the lifeboat scenario to "ordinary ethical values;" if law was not a subset of ethics, i.e. if it did not deal with "ought" statements such an analogy would be incoherent. Furthermore, Rothbard is correct that "we are not, in constructing a theory of liberty and property [...] concerned with **all** personal moral principles," we are rather only concerned with those moral principles that pertain to conflicts over scarce means. This does not, as the critics claim, demonstrate that law and ethics are disconnected fields. Clearly, if we are concerned with a subset of all moral principles which deals specifically with conflicts in doing law then law itself is a subset of morality in general. This analysis is also consistent with Rothbards claim that "[w]hether or not it is moral or immoral for 'Smith'–the fellow excluded by the owner from the plank or the lifeboat–to force someone else out of the lifeboat, or whether he should die heroically instead, is not our concern, and not the proper concern of a theory of political ethics." It very much appears to me that Rothbard is merely leaving the floor open for his legal theory to be compatible with any outside ethical theory that one may come up with—even one that would allow for contradictions between "personal" and "political" ethics. Of course, such a theory would be false, but that is not the concern of Rothbard qua legal theorist. This becomes clear in a footnote attached to the end of the above paragraph, commenting on an example where two men are floating in the water and there is a plank that can save only one of them:

> Eric Mack's example fails to show a necessary conflict between property rights and moral principles. The conflict in his example is between property rights and the dictates of prudence or self-interest. But the latter is only dominant in morality if one adopts moral egoism, which indeed Professor Mack does, but which is only one possible moral theory.

This makes it abundantly clear to me that Rothbard is, as I claim, simply trying to make his ethic as narrow as possible such that it may be slotted into any general ethical theory. Rothbard continues:

> The crucial point is that *even* if the contextualist libertarian may say that, given the tragic context, Smith *should* throw someone else out of the lifeboat to save his own life, he is *still* committing, at the very least, invasion of property rights, and probably also murder of the person thrown out. So that even if one says that he should try to save his life by forcibly

> grabbing a seat in the lifeboat, he is still, in our view, liable to prosecution as a criminal invader of property right, and perhaps as a murderer as well. After he is convicted, it would be the *right* of the lifeboat owner or the heir of the person tossed out to forgive Smith, to pardon him because of the unusual circumstances; but it would also be their right *not* to pardon and to proceed with the full force of their legal right to punish. Once again, we are concerned in this theory with the rights of the case, *not* with whether or not a person chooses voluntarily to exercise his rights. In our view, the property owner or the heir of the killed would have a right to prosecute and to exact proper punishment upon the aggressor. The fallacy of the contextualists is to confuse considerations of individual, personal morality (what should Smith do?) with the question of the rights of the case. The right of property continues, then, to be absolute, even in the tragic lifeboat situation.

Again, Rothbards use of the *even if* disclaimer prior to the hypothetical proof that Smith should throw someone out of the lifeboat is a crystal-clear signal that Rothbard is merely entertaining this *as* a hypothetical counter to his thesis. What Rothbard has done is that he has shown his theory of property rights to hold *even if* someone were to prove that there are separate "personal" and "political" spheres of ethics. To re-iterate; Rothbard has not here *accepted* that there is indeed such a proof, all he has done is shown that the existence of such a proof is *irrelevant* to his legal theory.

Of course, such a proof does not exist, as said multi-sphere ethics would be a polylogism. Ought is ought, there is not ought-but-personal and a separate ought-but-political. There is only ought. Confusion on this matter comes due to colloquial usage of the word "ought" in sentences like, "you ought wear a coat because you don't want to get wet." There are two ways we can interpret this statement, either we assume that "ought" is being used in the precise logical meaning, or we assume it is being used as prudential advice. In the former case, the statement is simply invalid, it does not follow from the fact that a person doesn't want to get wet that they ought prevent themselves from getting wet by wearing a coat. After all, I may want to rape a baby but it does not follow from the existence of this whim that I actually ought obey it. The latter interpretation of "ought" being prudential advice is a colloquial usage of the word—what is really being said is "if you want to not get wet wearing a coat will achieve this goal," which is clearly an "is" statement, all that is being said is that the given strategy will attain the goal, not whether the goal is proper. Thus it could not be that "politically" you ought not aggress but "personally" you ought aggress, as that would be a contradiction—you ought aggress and you ought not aggress. Then it appears clear that Rothbard holds law as a subset of ethics but has also successfully shielded his theory from any attack which would seek to separate them.

This stance becomes confusing in the light of modern Austrian theorists, Hoppe has shown with his argumentation ethics that any attempt at negating the NAP leads to contradiction, but elsewhere claims that he was not attempting to derive an "ought" from an "is."[67] But surely if an ought statement which negates the NAP falls into contradiction its negation must be true?

[67] Hans-Hermann Hoppe (2005), *The Economics and Ethics of Private Property*, pp. 322, 345, 401, 408.

This will be analysed in greater depth below, but for now the contextualist counter-thesis to my position is summed up explicitly by Konrad Graf:[68]

> Placing deductive legal theory within praxeology enables its reconstruction as a categorical and definitional assessment of what types of actions are NAP infringements—separate from moral assessment of such infringements. In this view, an example of an ethical statement would be, "One should not violate rights." Legal theory helps to make this goal actionable by supplying information concerning the question: "What is 'violating rights?'"

And what then does it mean to violate a right? As I'm sure Konrad would agree[69] it means that you could not justify your conduct, but what does it mean that you cannot justify your conduct? It means you cannot claim that your conduct **should** go forth as said claim implies a contradiction, thus its negation that your conduct **should not** go forth is true. This is a legal claim **and** an ethical one—in fact, *every* legal claim is also an ethical claim, as every legal claim is a claim about which party **should** have possession in the conflict at hand.

> There *is* an intuitive relationship between law and ethics. However, I argue that it is not one of a field to a sub-field, but rather an *advisory* relationship between two distinct fields. […] If one takes on the moral objective of not aggressing, one is more likely to be *successful* at this in action with a clear idea of what aggression is. "Rights infringements" become one category of wrongs next to other non-legal categories of wrongs that a given ethical system may specify. Yet the definition of *what constitutes* infringing rights is derived independently of ethics using the categorical, counterfactual method of praxeology. Although [Argumentation Ethics] establishes that no propositional argument against the NAP can succeed, it does not prevent human beings from infringing the NAP *anyway*.

Indeed, Konrad is correct that argumentation ethics does not prevent people from engaging in aggression, but it does demonstrate that any attempted justification of that aggression would fall into contradiction—that is to say any claim that one *ought* aggress implies a contradiction and thus its negation that one *ought not* aggress is *true*. Just as the fact that 1+1 makes 2 does not prevent people from acting erroneously on the thought that it actually makes 3, so too does the fact that aggression is evil not prevent people from erroneously acting on the thought that it is good. Furthermore, Konrad himself states that "the NAP forms the outer boundary of justifiability for any norm or rule,"[70] this is because any norm in contradiction to the NAP is simply incoherent via the nature of justification as such. Law is pointless if it is not a subset of ethics—*A* is a crime, but so what? What does it mean to have a right if it doesn't mean that it should not be violated? Could one accept wholesale the NAP and the entire Rothbardian politics whilst agreeing with

[68]Konrad Graf (2011), "Ethics: Disentangling Law and Morality," in idem., *Action-Based Jurisprudence: Praxeological Legal Theory in Relation to Economic Theory*, Libertarian Papers 3, 19.

[69]Konrad accepts Hoppes argumentation ethics proof of libertarian theory, thus the nature of justification is surely the root of his understanding of rights.

[70]Konrad Graf (2011), *Action-Based Jurisprudence: Praxeological Legal Theory in Relation to Economic Theory*, Libertarian Papers 3, 19, p. 53.

every ethical prescription we hear from the Marxists? If ethics and law merely intersect, where do they intersect, and why not elsewhere? What are those rights that should be violated and in what sense are they even rights if they shouldn't be respected?

A favourite quote of the ethics and law separators comes from Hoppe himself, who states:[71]

> [T]he praxeological proof of libertarianism has the advantage of offering a completely value-free justification of private property. It remains entirely in the realm of is-statements and never tries to derive an "ought" from an "is." The structure of the argument is this: (a) justification is propositional justification—a priori true is-statement; (b) argumentation presupposes property in one's body and the homesteading principle—a priori true is-statement; and (c) then, no deviation from this ethic can be argumentatively justified—a priori true is-statement. The proof also offers a key to an understanding of the nature of the fact-value dichotomy: Ought-statements cannot be derived from is-statements. They belong to different logical realms. It is also clear, however, that one cannot even state that there are facts and values if no propositional exchanges exist, and that this practice of propositional exchanges in turn presupposes the acceptance of the private property ethic as valid. In other words, cognition and truth-seeking as such have a normative foundation, and the normative foundation on which cognition and truth rest is the recognition of private property rights.

Hoppe is indeed correct that his above syllogism is not of the form "*is statement*, *is statement*, therefore *ought statement*," but those in the Konrad-camp are incorrect to conclude from this that argumentation ethics fails to demonstrate the truth and falsehood of different ought statements. As Hoppe himself stated in that very passage recognition of the private property ethic (aka the NAP) as valid is a pre-condition for arguing over anything—thus, to try and dispute the NAP you have to first accept that it is true giving it axiomatic status just as surely as the action axiom or the law of non-contradiction. Furthermore we can use the conclusion of Hoppes above syllogism to construct a new syllogism:

1. I ought engage in aggression $X \rightarrow p \land \neg p$ (a priori true is-statement);
2. $\neg(p \land \neg p)$ (a priori true is-statement);
3. $\therefore$ I ought *not* engage in aggression X (a priori true ought-statement).

In other words, $\neg\ \mathrm{NAP} \rightarrow p \land \neg p \therefore \neg(\neg\ \mathrm{NAP}) = \mathrm{NAP}$, but how could this be if facts and values "belong to different logical realms?"

Dismantling Hume's Guillotine

The issue we come to with this view is a dogmatic application of Hume's Guillotine, also called the fact-value dichotomy—the claim is that its impossible to derive an *ought* from an *is*. But clearly I have done just that; the negation of the NAP is an ought statement that implies a contradiction, contradictions are false, therefore the NAP is true—it is a *true* ought statement. However you want to describe this, whether I have "sidestepped" or "transcended" or plowed straight through

[71] Hans-Hermann Hoppe (2005), "On The Ultimate Justification of the Ethics of Private Property," p. 345, in idem., *The Economics and Ethics of Private Property*, second ed.

Hume's Guillotine the fact remains that there are *true* values and thus there is no *dichotomy* between facts and values.

This statement is incredibly controversial in the face of modern subjectivist philosophy, where insofar as ethics is even thought about it is dismissed out of hand as a mere description of what people want to do. But of course, saying that a person, A wants to do X over $\neg X$ is the claim that A thinks he *should* pick X over $\neg X$ when given the chance—that is to say a preference for X over $\neg X$ *is itself* an ethical claim, so choice itself has value implications. I imagine almost everyone takes the is-ought gap for granted, thus I will take some time to further elaborate on why the fact-value dichotomy does not exist.

First, values in the ethical sense are not arbitrary, insofar as a person is engaging in any form of evaluation or making some argument or acting at all, he is necessarily making the choice of existence over non-existence. That is to say, to remain in reality, to claim anything to be correct at all, you must hold life as a value. To negate the value of life would be to immediately contradict oneself, as said negation would have to be performed by a living man, who chooses to keep living for the purpose of uttering his negation. The good therefore corresponds to that which is pro-life, and the bad that which is anti-life. Furthermore, man is not an automaton, he evaluates because he chooses, the choice he has at any crossroads is whether to be pro-life–i.e. in correspondence to reality–or anti-life–i.e. not in correspondence to reality. In other words, a man has always the choice whether to accept truth (to think) or to reject truth (to evade it). Because evading reality is itself a rejection of truth one cannot coherently argue for evasion, as this would involve making the truth claim that there is no such thing as truth—to which all one can ask is, "is it *true* that there is no such thing as truth?"

Because evasion or pro-falsehood is anti-life, and life is undeniably good, evasion is undeniably bad. In other words, any is-statement implies a set of ought-statements, and vice versa. Making a moral claim implies pre-suppositions about epistemology and metaphysics, and making claims about epistemology and metaphysics necessarily imply certain things about ethics.

> In the objective approach, since every fact bears on the choice to live, every truth necessarily entails a value-judgment, and every value-judgment necessarily presupposes a truth. As Ayn Rand states the point in "The Objectivist Ethics": "Knowledge, for any conscious organism, is the means of survival; to a living consciousness, every 'is' implies an 'ought.'" Evaluation, accordingly, is not a compartmentalized function applicable only to some aspects of man's life or of reality; if one chooses to live and to be objective, a process of evaluation is coextensive with and implicit in every act of cognition.[72]

That is, facts about reality, such as that the sun shines, or that lightning strikes, have implications for mans self-preservation, and because man objectively ought endeavour to preserve himself, these metaphysically given facts imply certain things about what man should be doing. The fact that the sun shines and that within certain limits sunshine is good for man implies all sorts

[72]Leonard Peikoff, *Fact and Value*, https://peikoff.com/essays_and_articles/fact-and-value/

of oughts. For instance, other things being equal we ought grow our crops in the shine rather than the shade, because doing so will yield more crops and thus further mans life more than the alternative. Also we ought build our houses such that they have windows and we can get vitamin D. But sunlight can also cause us damage by burning our skin if we get too much of it, so other things being equal we ought avoid this outcome, perhaps by wearing sun-screen or bringing an umbrella for shade. "All these evaluations are demanded by the cognitions involved [...]."[73]

Again, because these things are pro-life, they are pro-truth and reality, therefore these oughts cannot be coherently negated. Moreover, to attempt to negate such an ought is indicative of an error in the thinker in question—they are either making an honest mistake or they are on an active rebellion against truth. Because error is bad, to embrace an error as fully as does the thinker in active rebellion against truth implies that the proper moral evaluation of this thinker is that he is wicked. Now, this is not the case for all such instances of perpetuating a falsehood, men are capable of making honest mistakes in their understanding of reality, this is most prevalent in the very young or in the intellectually impared. This is quite distinct to the academic Marxists and other subjectivists who dedicate their lives to the perpetuation of intellectually dishonest ideas.

> [...] If the conscientious attempt to perceive reality by the use of one's mind is the essence of honesty, no such rebellion can qualify as "honest."
>
> The originators, leaders and intellectual spokesmen of all such movements are necessarily evaders on a major scale; they are not merely mistaken, but are crusading irrationalists. The mass base of such movements are not evaders of the same kind; but most of the followers are dishonest in their own passive way. They are unthinking, intellectually irresponsible ballast, unconcerned with logic or truth. They go along with corrupt trend-setters because their neighbors demand it, and/or because a given notion satisfies some out-of-context desire they happen to feel. People of this kind are not the helplessly ignorant, but the willfully self-deluded.
>
> **EVEN IN REGARD** to inherently dishonest movements, let me now add, a marginal third category of adherent is possible: the relatively small number who struggle conscientiously, but simply cannot grasp the issues and the monumental corruption involved. These are the handful who become Communists, "channelers," etc. through a truly honest error of knowledge. Leaving aside the retarded and the illiterate, who are effectively helpless in such matters, this third group consists almost exclusively of the very young — and precisely for this reason, these youngsters get out of such movements fast, on their own, without needing lectures from others; they get out as they reach maturity. Being conscientious and mentally active, they see first-hand what is going on in their movement and they identify what it means; so their initial enthusiasm turns to dismay and then to horror. (Andrei in *We the Living* may be taken as a fictional symbol here.) The very honesty of such individuals limits their stay in the movement; they cannot tolerate for long the massiveness of the evil with which they have become involved. Nor, when such youngsters drop out, do they say to the

[73] Ibid.

> world belligerently: "Don't dare to judge me for my past, because my error was honest." On the contrary — and here I speak from my own personal experience of honest errors that I committed as a teenager — the best among these young people are contrite; they recognize the aid and comfort, inadvertent though it be, which they have been giving to error and evil, and they seek to make amends for it. They expect those who know of their past creeds and allegiances to regard them with suspicion; they know that it is their own responsibility to demonstrate *objectively* and across time that they have changed, that they will not repeat their error tomorrow in another variant, that their error was innocent.[74]

Any form of ethical subjectivism which is required for the fact-value dichotomy to stand, implies an epistemology that holds that mere whims are the proper source of evaluation. This would make ethics (and therefore law) a completely pointless field with no reason for existing. That is to say, erecting Hume's guillotine implies the complete demolition of ethics to the chattering applause of the most evil philosophies known to man. But, as Hoppe points out[75] there are certain norms, namely property rights, must be accepted as valid prior to beginning any ethical deliberation whatsoever, even an ethical deliberation that seeks to destroy ethics. Therefore any ethical theorist who attempts to erect a dichotomy between fact and value must accept as valid certain values whilst attempting to demonstrate the invalidity of value as such. So a philosopher qua ethical theorist *cannot* speak of Hume's Guillotine without falling into utter incoherence, and thus ethical subjectivism is an incoherent anti-ethics.

The immorality of error in ones understanding of the metaphysically given, such as that the sun shines, or that gravity causes objects to fall, pales in comparison to the immorality present wherever there are errors in man-made facts. Consider a world of total unreason in philosophy —such a world would imply mass death and suffering of the worst kind as all men would be acting as did Mao and Hitler and Stalin. No matter the level of technological development, such a society would be incapable of supporting human life. On the contrary, a far more technologically primitive society that accepts entirely reason and objective reality would find barely any natural disasters that could not be withstood. The standard of living in such a society would quickly soar where the opposite is true of the irrational society.

> […] To an individual in a division-of-labor society, it makes a life-or-death difference whether he is surrounded by producers or parasites, honest men or cheats, independent men or power-lusters. Just as one must distinguish between good and bad in relation to the realm of nature, so one must distinguish between good and bad in relation to the realm of man.
>
> In Objectivist terms, this means a single fundamental issue: in the human realm, one must distinguish the rational from the irrational, the thinkers from the evaders. Such judgment tells one whether a man, in principle, is committed to reality — or to escaping from and fighting it. In the one case, he is an ally and potential benefactor of the living; in the other, an enemy and potential destroyer. Thus the mandate of justice: identify the good (the rational)

[74] Ibid.

[75] Hans-Hermann Hoppe, Introduction to Murray Rothbard, *Ethics of Liberty*

> and the evil (the irrational) in men and their works — then, first, deal with, support and/or reward the good; and, second, boycott, condemn and/or punish the evil.[76]

So the proper moral evaluation of an idea or more broadly a philosophy is that it is good insofar as it promotes human flourishing, and bad insofar as it does the opposite. This evaluation is not based on an arbitrary whim of the evaluator, it is not the claim that the idea or philosophy in question is merely distasteful to the man making the evaluation. An objective evaluation must make reference to the objective and undeniable value of life itself.

> Implicit in saying that a certain idea is true is a positive moral estimate of the mental processes that led to it (a credit to the individual for having worked to grasp reality), *and* a positive estimate of the existential results to come (a true idea will have to yield pro-life results when men act on it). The same applies *mutatis mutandis* to false ideas. Implicit in saying that an idea contradicts the facts of reality is a negative estimate of the processes that led to it, and also of the effects the idea will have in practice, which have to be harmful. If one's ideas are tied to reality at all and if one is guided by life as the standard, there is no way to identify an idea's truth or falsehood without in some form also making such evaluations.
>
> […]
>
> Truth is a product of effort and leads in action to value(s); hence, one says, the true idea is not only true: it is also good. Falsehood, assuming it reaches a certain scale, is a product of evasion and leads to destruction; such an idea is not only false; it is also evil.
>
> An employee, to take a relatively modest positive example, offers a man an idea for improving the operation of his business. His idea, the boss concludes after weighing the evidence, takes into account all the relevant facts; he's right. So far, this is pure cognition, the outcome of which is expressed in a statement like: "I agree with you." But no decent person, whether he knows philosophy or not, would stop there; he would not say unemotionally, like a dead fish: "Your idea is correct. Good day." On the contrary, precisely because the new idea represents a new grasp of reality, the moral kind of boss is enthusiastic, i.e., he *evaluates* the idea. He cannot avoid seeing two things: this employee of mine had to innovate, struggle, think to reach the idea when no one else did, and: the idea will cut my costs, increase my customers, double my profits. The boss, accordingly, is excited, he likes his employee, he praises him, he rewards him. He not only says about the idea: "true." As an inevitable corollary, he says about it: "good." That "good" is the evaluation or the "ought"; it represents the practice of justice and the tie to life.[77]

Thus it is completely inescapable that true is-statements imply true evaluations related to those statements, and false is-statements imply false evaluations related to those statements. Just as it is an error for the primitive man to attempt to make it rain by dancing, it is an error to commit murder, or to steal a wallet. These actions are bad because they are destructive of life and human

[76] Leonard Peikoff, *Fact and Value*, https://peikoff.com/essays_and_articles/fact-and-value/
[77] Ibid.

flourishing, it is impossible to construct a rational property norm where aggression is allowed. And just as the fact that the rain-dancer is acting in error is not negated by the fact that he is still capable of performing the rain-dance nor is the fact that the murderer is acting in error negated by the fact that he is still capable of murder. It is incoherent to claim any crime to be a moral virtue, as every crime implies an evasion of objective law, and evasions are per se errors and errors are per se immoral. The true is the good, and the good is the true.

Some Choice Quotes

The following is a bank of miscellaneous quotes to demonstrate that I am not alone–nor particularly outside the (libertarian) norm–in my assertion that law is a subset of ethics, which critics (you know who you are) have attempted to paint as the case (my emphasis added):

> The present work attempts to fill this gap, to set forth a systematic ethical theory of liberty. It is *not*, however, a work in ethics *per se*, but only in that **subset of ethics** devoted to political philosophy.
>
> —Murray Rothbard[78]

> It is not the intention of this book to expound or defend at length the philosophy of natural law, or to elaborate a natural-law **ethic** for the personal morality of man. The intention is to set forth a social **ethic** of liberty, i.e., to elaborate that **subset** of the natural law that develops the concept of natural rights, and that deals with the proper sphere of "politics," i.e., with violence and non-violence as modes of interpersonal relations. In short, to set forth a political philosophy of liberty.
>
> —Murray Rothbard[79]

> A vital point: if we are trying to set up an ethic for man (in our case, the **subset of ethics** dealing with violence), then to be a valid ethic the theory must hold true for *all* men, whatever their location in time or place.
>
> —Murray Rothbard[80]

> *Political* philosophy is that **subset of ethical philosophy** which deals specifically with *politics*, that is, the proper role of violence in human life (and hence the explication of such concepts as crime and property).
>
> —Murray Rothbard[81]

[78] Murray N. Rothbard (1982), *The Ethics of Liberty*, p. xlviii
[79] ibid., p. 25
[80] ibid. p. 42
[81] ibid. p. 258

If ethics is a normative discipline that identifies and classifies certain sets of actions as good or evil, right or wrong, then tort or criminal law is a **subset of ethics** identifying certain actions as appropriate for using violence against them. The law says that action X should be illegal, and therefore *should* be combated by the violence of the law. **The law is a set of "ought" or normative propositions**.

Many writers and jurists have claimed the law is a value-free, "positive" discipline. Of course it is possible simply to list, classify and analyze existing law without going further into saying what the law should or should not be. **But that sort of jurist is not fulfilling his essential task**. Since the law is ultimately a set of normative commands, the true jurist or legal philosopher has not completed his task until he sets forth what the law should be, difficult though that might be. If he does not, then he necessarily abdicates his task in favor of individuals or groups untrained in legal principles, who may lay down their commands by sheer fiat and arbitrary caprice.

—Murray Rothbard[82]

Political philosophy is the **subset of ethics** that deals with how two or more humans ought to interact with each other in society. It says nothing about how individuals should act in isolation. It answers social questions by showing us what is fair, just, and moral. Generally, the task of the political philosopher is to discover under what conditions it is ethically justifiable for humans to coerce or use violence against other humans. This question is prior to all man made laws, as coercion is required in order to enforce these positive decrees.

—Daniel Gibbs[83]

The vast bulk of legal theories throughout history have proceeded on the basis that an adequate and informative descriptive theory of law must also examine its normative basis in ethics and politics.

—Jonathan Crowe[84]

The non-aggression axiom is the simple idea that it is **immoral** to initiate force against another person or their property. […] To libertarians, *any* use of force to change people's behavior for any reason is a profoundly **immoral** act.

—Ron Paul[85]

For a start, I believe the political must be explained in terms of the moral, or nonpolitical.

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[82]idem. (1982), *Law, Property Rights, and Air Pollution* (pagination retained from idem. (1997), *The Logic of Action Two*, pp. 121-170), p. 122

[83]Daniel Gibbs, *The Justice of Inequality: Argumentation Ethics and Radical Non-Aggression*

[84]Jonathan Crowe (2019), *Natural Law and the Nature of Law*, p. 2

[85]Ron Paul, foreword to Walter Block (2013), *Defending the Undefendable II: Freedom in All Realms*, p. x

—J. Mikael Olsson[86]

As legal theorists, therefore, we cannot accept an entirely mechanistic picture of the world. Legal theorizing is concerned with the ethical implications of action. It asks whether an actor **should** be held responsible for the consequences of his actions.

—N. Stephan Kinsella and Patrick Tinsley[87]

Now because on the due date "Jones refuses to pay," he finds himself in possession of \$1100 the title to which "has already been *transferred*" to Smith. So, he finds himself in possession of Smith's rightful property. From this it is supposed to follow that Jones **ought** to have a legal duty to pay \$1100, for unless he makes this payment, he becomes the thief of Smith's \$1100.

—Łukasz Dominiak and Tate Fegley[88]

I have no problem with the thesis that, in a libertarian legal order, no individual or group […] **should** aggress against any person or any person's property.

—Frank van Dun[89]

A "right" is a **moral principle** defining and sanctioning a man's freedom of action in a social context.

—Ayn Rand[90]

For Rothbard, immigration restrictions represented pure protectionism — favoring domestic workers over foreign in what **ought** to be an international division of labor

—Jeff Deist[91]

I shall contend that emigration, migration, and immigration all fall under the rubric of "victimless crime." That is, not a one of these three per se violates the non-aggression axiom. Therefore, at least for the libertarian, no restrictions or prohibitions whatsoever **should** be placed in the path of these essentially peaceful activities.

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[86]J. Mikael Olsson (2016), "Justifying the State from Rights-Based Libertarian Premises," *Libertarian Papers*. 8 (1): 59-79. ONLINE AT: libertarianpapers.org.

[87]N. Stephan Kinsella and Patrick Tinsley (2004), "Causation and Aggression," in *The Quarterly Journal of Austrian Economics* Vol. 7, No. 4 (Winter 2004): 97-112

[88]Łukasz Dominiak and Tate Fegley (2022), *Contract Theory, Title Transfer, and Libertarianism*, p. 10

[89]Frank van Dun, "Against Libertarian Legalism: A Comment on Kinsella and Block," *Journal of Libertarian Studies* 17, no. 3 (Summer 2003), pp. 63-90

[90]Ayn Rand, "Man's Rights," in idem. *The Virtue of Selfishness* and in idem. *Capitalism: The Unknown Ideal.*

[91]Jeff Deist, *Immigration Roundtable: Murray Rothbard*, https://mises.org/library/immigration-roundtable-murray-rothbard

—Walter Block[92]

Is this petty? Perhaps. Is it necessary? Probably.

Related Reading

- Leonard Peikoff, *Fact and Value*, https://peikoff.com/essays_and_articles/fact-and-value/

[92]Walter Block, "A Libertarian Case for Free Immigration," *Journal of Libertarian Studies* 13:2 (Summer 1998): 167-186